(1) Supreme Court, U.S.
FILED
031275 MAR 10 2004
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ARMANDO V. MUNOZ,
Petitioner-Appellant,

v.

M. KNOWLES, WARDEN,
Respondents-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court held that a due process claim based on the destruction of evidence potentially favorable to the defense is foreclosed unless the defense can demonstrate "bad faith" on the part of the police. This rule applies even where, as here: (1) The police, after seizing the crime scene and without giving the defense an opportunity to test it, destroyed blood and other physical evidence which could have exonerated Petitioner. (2) The destroyed evidence could have been easily subjected to definitive tests, including DNA testing. (3) The failure to collect the evidence was, at the very least, the product of negligence by the police. (4) The evidence which was destroyed was "material" to the defense, in that its absence deprived the defense of the ability to corroborate Petitioner's testimony as to necessary elements of his defense. (5) Once the crime scene had been released by the police and the evidence destroyed, it was impossible for the defense to obtain substitute evidence. (6) The strength of the prosecution case was impaired by major contradictions in the testimony of the chief prosecution witnesses.

The question presented is whether the *Youngblood* rule should be now be re-examined and replaced with a multi-factor balancing test in which bad faith is but one of a number of factors to be considered in determining whether a defendant's due process rights have been violated by the negligent destruction of material evidence. Among the reasons urged for the repeal of the *Youngblood* rule are, inter alia, its inconsistency with prior precedent of this Court; its nearly universal condemnation by commentators and its rejection by more than a quarter of the states; the likelihood that innocent persons will be unable to satisfy the requirement to prove subjective bad faith by the police; and the DNA revolution occurring over the past 15 years, which has rendered the rule both obsolete and contrary to sound public policy in 21st Century America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ARMANDO M. MUNOZ respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's application for Certificate of Appealability.

OPINIONS BELOW

The following opinions and orders below are pertinent here, all of which are unpublished: [1] Opinion on direct appeal by the California Court of Appeal, Fifth Appellate District, affirming Petitioner's conviction and sentence (2/7/00); [2] Order (8/18/03) and Judgment (8/20/03) by U.S. District Court for the Eastern District of California (Hon. Sandra M. Snyder), denying petition for writ of federal habeas corpus (8/18/03); [3] District Court Order Denying Request for Certificate of Appealability (10/9/03); [4] Order by Ninth Circuit Court of Appeals Denying Request for Certificate of Appealability (12/17/03). (See Appendix for copies.)

STATEMENT OF JURISDICTION

The District Court and the Court of Appeals for the Ninth Circuit denied Petitioner's request for Certificate of Appealability. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court held that, pursuant to 28 USC § 1254(1), the United States Supreme Court has jurisdiction, on certiorari, to review a denial of a request for Certificate of Appealability by a circuit judge or panel of a Federal Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 USC § 2254. The standard for relief under "AEDPA" is set forth in 28 USC § 2254(d)(1).

STANDARD OF REVIEW: DENIAL OF CERTIFICATE OF APPEALABILITY

In *Miller-El v. Cockrell*, 537 U. S. 322, 123 S.Ct. 1029 (2003), this Court clarified the standards for issuance of a Certificate of Appealability [hereafter "COA"]:

> ... A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right". A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further .... We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id., 123 S.Ct. at 1034, citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

STATEMENT OF THE CASE

Petitioner was convicted by a California jury of one count of first-degree murder, two counts of attempted murder, assault with a deadly weapon, and assault with a gun. (Cal. Pen. Code §§ 187, 245.) A number of enhancements were also found to be true. Petitioner was sentenced to 25 years to life on the murder, plus 18 years in enhancements. He was also given consecutive sentences of life with possibility of parole on the attempted murder counts.

At trial, Petitioner's defense was "perfect" self-defense as to the attempted murders and "imperfect" self-defense as to

the murder.[1] At trial and on direct appeal he contended, inter alia, that his due process rights had been irreparably harmed by the failure of the investigating officers to preserve physical evidence, primarily blood and blood spatter evidence, that would have supported his defenses. In particular, Petitioner alleged that the violent acts with which he was charged had occurred during a dynamic series of events at a motel; that the motel rooms contained a plethora of blood, blood spatter, fingerprint, and other physical evidence that was critical to corroborating the self-defense claims to which he testified; that the police had seized and cordoned off the crime scene just long enough to gather a few items which incriminated Petitioner; but that, without notice to Petitioner or his counsel and before more extensive testing of the motel could be done by the defense, the police released the motel to the owners, resulting in the destruction of all of the remaining physical evidence. Petitioner's contentions were supported by expert testimony, including experts called by both the prosecution and the defense, who agreed that the police had acted incompetently in failing to collect and preserve the blood evidence before allowing it to be destroyed.

On direct appeal, the California Court of Appeal concluded that this was a "failure to collect" case, and therefore that Petitioner's Due Process claim could not

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[1]In addition to traditional ("perfect") self-defense, which is a complete defense, California law allows for "imperfect self-defense", based on the defendant's honest but unreasonable belief in the need to defend against great bodily injury or death. Imperfect self-defense is a partial defense, which reduces murder to manslaughter.

succeed without evidence of "bad faith" on the part of the investigating officers. Hence, and relying on this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1989), the state court held:

> ... Because more samples could have been taken does not mean the police acted in bad faith, or that the investigation performed violated defendant's due process rights .... *The question here is not whether more evidence could have been collected, but whether the police acted in bad faith in failing to collect certain pieces of evidence. The answer is the police did not act in bad faith* .... ¶ In sum, there was no testimony that any member of the investigating team had developed a *bias* against defendant, choosing only to collect certain pieces of evidence .... *Therefore, we find defendant's due process rights were not violated by the investigation performed. Defendant has failed to show that the evidence he claims should have been collected was not collected because of the bad faith of the investigating officers.*

Cal. Court of Appeal opinion, pp. 21, 24 [emphasis in original [underlined] and added [italics].

After exhausting his Due Process claim in the California courts, Petitioner brought it again on federal habeas corpus. The District Court denied the claim on the same basis, citing *Youngblood*, and finding that "*a showing of bad faith by police was necessary in order to demonstrate a due process violation.*" Dist. Ct. Order at 17, quoting from the California opinion [emphasis added].

Petitioner sought a Certificate of Appealability ("COA") in the District Court and in the Ninth Circuit, arguing, inter alia, that the *Youngblood* rule denied him due process in a

case in which the evidence which the police destroyed was material to his defense, but he was unable to demonstrate subjective bad faith on the part of the police. Both the District Court and the Ninth Circuit denied Petitioner a COA, with the circuit court's rejection issuing on Dec. 17, 2003.

Petitioner now seeks a writ of Certiorari from this court on the basis that the *Youngblood* rule should be revisited and, for the reasons stated herein, abrogated and replaced by a balancing test in which "bad faith" is just one of many factors to be considered in evaluating a due process challenge based on a the State's failure to collect and preserve blood and other physical evidence material to guilt or innocence.

STATEMENT OF PERTINENT FACTS

Trial Testimony Re Police Failure to Preserve Crime Scene Evidence

The incidents in question occurred at a motel in Hollister, CA, beginning at about midnight on the night of May 17-18, 1996. Shortly after 2 AM on May 18, the police sealed off the entire crime scene and preliminary conducted witness interviews, from which they learned all of the following:

(1) Petitioner stated that he was attacked by Andres Gonzales, his friend for many years, when Petitioner interrupted Gonzales's attempt to steal Petitioner's money; and that he had wounded Gonzales while acting in self-defense. (CT 232.)

(2) Petitioner had suffered a 3-4" laceration across his right palm, and a 4-5" deep laceration under his left armpit - injuries which were entirely consistent with defensive wounds. (CT 234.)

(3) Witnesses reported hearing an argument coming from the area of Rooms 237 and 238, further corroborating

Petitioner's claim of self-defense. (CT 207.)

(4) Erica Munoz[2] gave an inherently implausible account of a mysterious, unprovoked, violent explosion by Petitioner. Her story contradicted Gonzales's story in several crucial respects, most notably in how the fight started (CT 221, 234.)

(5) Petitioner told investigators that a gun involved in the struggle belonged to Gonzales. Gonzales's story about the guns gyrated wildly; he initially denied seeing the .357, but later acknowledged handling it. Fingerprints on the bullet casings, found on the floor of Room 238, would have revealed who loaded the .357. (CT 237.)

Despite having been provided with this and information supporting Petitioner's self-defense claim, when the officers went to the scene to conduct their investigation, they collected a total of only four samples of blood from Room 238: one from a paint can, one from a mirror, one from carpet and another from the threshold of the door connecting Room 237 to 238. Notwithstanding the existence of tens of thousands of blood droplets in Room 238, no samples were taken from the bloodstained walls. Although photographs of blood-spatter patterns were taken, all of them proved to be totally useless in conducting meaningful blood-spatter analysis. Except for a paint can and a knife sheath , no items of consequence from Room 237 or Room 238 were retained. A broken and bloody cellular phone involved in the struggle between Petitioner and Gonzales was not collected, and therefore was discarded by clean-up crews. No firearms were seized. No fingerprints were taken from Room 238. (RT 304;

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[2]Erica Munoz, the alleged victim, is not related to Armando Munoz, the Petitioner. To avoid using first names, we refer to Erica Munoz as "Munoz" and to Armando Munoz as "Petitioner".

317; 337; 1797, 1825-26.)

After leaving the motel following their initial investigation, the police learned from Gonzales that they had, remarkably, failed to discover a loaded handgun that Gonzales had concealed in the bed of Room 237. Deputy Christopherson then called the motel, was informed that the rooms remained in the same condition, dispatched a deputy to look for the gun - which was found, loaded with live ammunition. The investigators thus had another opportunity to properly process the room for evidence, and had reason to doubt the credibility of Gonzales (who had initially denied any involvement with guns or ammunition, and whom the police suspected of being involved in a drug deal), but they again left the scene without collecting or preserving any other physical evidence. (RT 235 et seq.)

Before daylight on the morning of May 18, 1996, no more than 5 hours after the incident, the police released the entire crime scene to the motel clean-up crews.

Testimony by the investigating officers regarding their reasons for failing to preserve the evidence under their dominion and control ranged from contradictory to unbelievable:

- Glen Johnson, the supervising deputy, testified at trial that he released the rooms at 7:00 a.m. the following morning because there were no relevant witness statements available prior to that time. This was patently untrue. When confronted with witness statements which the police had, in fact, obtained during the night, Johnson admitted that he wished they had taken more blood samples. (8 RT 1790.)
- Evidence technician Jim Ray testified that, although it was clear that a "major struggle" had taken place in the room, no fingerprints were taken because he deemed those

"irrelevant" to the investigation. However, the prosecution theorized that Petitioner had murdered the victim (Silva) precisely because there were no fingerprints of Silva's in Petitioner's room. Indeed, in arguing against Petitioner's motion for a new trial, the prosecutor actually relied on the lack of evidence from Petitioner's experts that Silva had entered the room as further proof of premeditation, even though the State's own actions had made the presentation of such evidence impossible. (RT 2728-2729.)

- Deputy Christopherson initially said that he did not ask that the cellular phone or other items be taken into evidence, or that more blood samples taken, because "it wasn't worth the cost of involving the D.A. crime lab." Later, however, he acknowledged that cost was not a factor in failing to seize and preserve the physical evidence. (8 RT 1799, 1828.)

Testimony of the Prosecutions's Two Star Witnesses Was Thoroughly Impeached

The chief prosecution witnesses at trial were Andres Gonzales and Erica Munoz. The defense thoroughly impeached both of these witnesses, demonstrating that they each had lied and that their two testimonies contradicted each other on some of the most fundamental details.

Impeachment of Andres Gonzales

- Gonzales testified at the Preliminary Hearing that he had never touched the .357 Magnum involved in the shooting, had never seen the .357, and knew nothing about it. However, Gonzales' fingerprints were found on the .357, and when so confronted, he admitted to deputies that he had handled the gun.
- Gonzales told investigators that he had nothing to do with the other handgun found at the scene, a .22. However, at trial Gonzales testified that Petitioner had

sold him the .22 pistol a week or ten days before May 17; and that Gonzales was carrying a gun on the trip for "protection". (RT 623, 1200).

- Despite being asked several questions about ammunition, Gonzales insisted initially that he had no knowledge or involvement with any ammunition for the handguns. However, Gonzales later testified that he was carrying in his van a box of .22 long rifle ammunition he had purchased at the K-Mart in Hollister one week before the trip; and that he was also carrying ammunition for the .357 Magnum in his car. (RT 623-624; 775.)

Impeachment of Erica Munoz

- Erica Munoz falsely stated during the investigation that Gonzales, Petitioner, and she were all present in Room 238 when Petitioner became upset. Later, she said Gonzales wasn't there. (4 RT 1481)
- When initially interviewed, Munoz told the deputies that the whole altercation began for some unknown reason, when Petitioner became mad and argued with Gonzales while all three of them were together watching television. She later changed her story, saying that Petitioner had first attacked her. (4 RT 1464; 7 RT 1519, 1543.)
- Munoz admitted lying to her friends about what had actually occurred in the motel room, telling them "other things" instead of the truth. She had been in hiding prior to her trial testimony; a bench warrant was issued for her arrest; and she was not located until just a few days before trial. (RT 1514-15; CT 594-99.)

Other Prosecution Witnesses Changed their Initial Statements Into Trial Testimony That Supported the Prosecution's Theories.

Three independent prosecution witnesses, Richard Freier, James Riling, and Nathan Charles completely changed their original versions of the facts, as related to the investigating officers. Freier originally told officers he'd stayed in his motel room and had seen nothing (RT 1458-60); Riling told an investigator he hadn't seen any stabbing (RT 1508-1510, 1540-41); Charles, when first interviewed, related no details about any stabbing (RT 1676 et seq.) However, by the time they testified at trial all three of these witnesses fell into line with testimony that supported the prosecution's version of the events.

Experts on both sides testified that the police failure to preserve critical physical evidence was incompetent and made routine forensic analysis impossible.

Dr. John Thornton, a nationally recognized forensic scientist, testified that good professional practice required much more blood sampling, fingerprinting, and photography than that done by the police; and that, to process the scene properly to include those elements would very probably have taken less than one half-hour. Dr. Thornton further testified that the blood evidence which the police failed to collect would have told a story as far as the positioning and activity of the people involved in the struggle; and that the failure to collect additional samples crippled the defense's ability to read the activity based on the blood. Dr. Thornton also testified that the police documentation of the blood samples was "sloppy", and that the failure to take fingerprints from bullet casings or cartridge poxes was "unfortunate." Finally, although a technician (Ray) had testified for the prosecution that he could it was impossible to take fingerprints from the bullet casings, Dr. Thornton testified that it was "not unusual" for

such prints to be obtained, and that fingerprints on the bullet casings would indicate the identity of the person who loaded the gun. (6 RT 1845-98.)

Defense expert criminalist Marc Taylor testified that blood sampling of each distinct blood spatter pattern should have been performed and photographed, but that it was impossible to make any blood spatter analysis from the photographs actually taken. In a crime scene like this one, Dr. Taylor would have expected 100 or more samples to have been taken, not just three. (5 RT 1718, 1721-22.)

Prosecution expert Dr. Brenda Smith *agreed* with defense experts and was candidly critical of the forensics procedures followed in this case. She testified that interpretation of the blood spatter evidence would have explained "whatever happened in the room," but that the police photographs were incompetently taken and utterly useless for any blood-spatter analysis. Dr. Smith testified that a "dynamic event" occurred in the room; that there was a "struggle that moved;" and that it was necessary to take a representative sampling of blood evidence to "explain the activity of whatever happened in the room." Nevertheless, no representative samples were collected by the police, nor were any competent blood-spatter photographs taken. As a result of the mishandling of the blood evidence by the police, Dr. Smith was "hampered in her ability to do any significant blood-spatter interpretation," and it was therefore impossible to use the blood evidence to determine "where people were and what was going on at a particular location." (RT 563, 566, 571, 573-74, 581, 585-86, 598, 600.)

The police failure to collect critical evidentiary items impaired Petitioner's ability to establish self-defense.

The police's failure to collect and preserve the following

specific items of physical evidence deprived Petitioner of an opportunity to effectively corroborate his claim of self-defense.

1. Blood spatter photos from the entire scene.

The police failed to collect any useful blood spatter evidence at all, as all of the photos which the police took were completely useless for blood spatter analysis. Blood spatter evidence would have shown where the different actors were and what they were doing in the course of a dynamic struggle which moved throughout the two rooms. Proper blood spatter photos could therefore have established that Petitioner's testimony - which , if believed by the jury, would have supported self-defense as to both of the attempted murder counts - was consistent with the blood spatter evidence.

2. Bloody cell phone.

The bloody cell phone was not tested before being destroyed. Petitioner's defense depended on showing that Gonzales initiated the attack rather than the other way around. Petitioner testified that he was attacked by Gonzales, who was wielding a knife, and that he put up his hand to ward off the blow, causing his hand to be lacerated by the knife. While bleeding from the knife wound, Petitioner then grabbed the cell phone and threw it at Gonzales. The witnesses uniformly recalled that the phone had blood all over it. If at least some of the blood on the phone was Gonzales' blood, that would have discredited Petitioner's account. However, if only Petitioner's blood were on the phone, it would have fully corroborated Petitioner's core claim that Gonzales stabbed him before Petitioner inflicted any wounds on Gonzales.

3. Fingerprints and blood samples from inside Petitioner's

motel room.

The police failed to take fingerprints from the door handle or anyplace else inside Petitioner's motel room , nor did the police take blood samples that would have shown whether Silva had entered the motel room during Petitioner's struggle with Gonzales. The District Attorney argued that Silva never entered Petitioner's motel room, but rather was killed in cold blood outside the room. Petitioner testified, however, that Silva surprised him inside the motel room, at which time Petitioner was engaged in a mortal struggle with Gonzales. If Silva actually had been inside Petitioner's room, as testified to by Petitioner and corroborated by other witnesses, it would have supported Petitioner's claim that Silva's sudden appearance in the room during the bloody altercation with Gonzales led Petitioner to honestly believe that Silva was there to "back up" Gonzales. Even if this belief may have been unreasonable, an honest but unreasonable belief in the need for self-defense would have reduced the offense from murder to manslaughter.

4. Fingerprints on bullet casings.

No fingerprints from the bullet casings were taken. If Gonzales' fingerprints were on the casings, it would have supported Petitioner's claim that Gonzales kept and loaded the weapon that Petitioner used only after he found it lying on the counter of the motel room. This would have flatly discredited Gonzales' claim that he had nothing to do with the weapon and never loaded it with ammunition. Gonzales was the principal witness against Petitioner, and whether the jury believed Gonzales or Petitioner was critical to the outcome.

REASONS FOR GRANTING THE WRIT

Argument Summary

The following factors were all present in this case:

(1) The police, after seizing the crime scene and without giving the defense an opportunity to test it. destroyed blood and other physical evidence which could have exonerated Petitioner.

(2) The evidence in question consisted of blood evidence which could have been easily and definitively subjected to DNA testing had it been preserved.

(3) The failure to collect the evidence was, at the very least, the product of negligence by the police.

(4) The evidence which was destroyed was "material" to the defense, in that its absence deprived the defense of the ability to corroborate Petitioner's testimony as to necessary elements of his defense.

(5) Once the crime scene had been released and the evidence destroyed, it was impossible for the defense to obtain substitute evidence.

(6) The strength of the prosecution case was impaired by major contradictions in the testimony of the chief prosecution witnesses, by inconsistencies in the testimony of prosecution evidence generally, and by lack of a credible motive.

Notwithstanding all of the above factors, based on this court's decision in *Youngblood*, Petitioner's due process claim arising from the police's destruction of evidence material to the defense was foreclosed because of the defense's inability to demonstrate "bad faith" on the part of the police. Petitioner maintains that *Youngblood*'s rule - requiring a showing of bad faith as a pre-condition to a due process challenge, regardless of how negligent the actions of the police or how material their omissions may have been -

should be reconsidered and replaced by a multi-factor balancing test. In particular, Petitioner maintains that the Youngblood rule was inconsistent with existing precedent when it was conceived; and that whatever questionable public policy which supported the rule back in 1989 has been obliterated by the DNA revolution which has taken place in the intervening 15 years. Consequently, and for all the reasons advanced below, Petitioner respectfully maintains that it is time for this court to re-examine the *Youngblood* rule and to replace it with a multi-factor, balancing test that is far more consistent with contemporary science, sound public policy, and fundamental fairness.

Reasons Why This Court Should Reject the *Youngblood* Test and Replace it With a Balancing Test.

1. *Youngblood* constituted a break with this Court's previous precedent.[3]

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[3]Petitioner's contention that *Youngblood* represents a break with prior precedent is an issue that was not addressed in this Court's recent per curiam decision in *Illinois v. Gregory Fisher*, 540 U.S. ___ (2004) (Case No. 03-374, decided 2/23/04). Fisher applied *Youngblood* to a situation where the police had already tested a substance and four times, with each test coming back positive for cocaine. Nevertheless, after making a discovery request and prior to trial, the defendant fled the jurisdiction, and while he was a fugitive, the evidence was destroyed by police, acting "in accord with their normal practice." (Id., at *4.) With the police having acted competently and properly, with defendant having fled the jurisdiction, and there being no frontal attack on the *Youngblood* rule itself, this Court applied *Youngblood* and reversed a lower court judgment dismissing the case based on the loss of evidence. Nevertheless, Justice Stevens' concurrence in *Fisher* fully supports Petitioner's position here: "*Youngblood*'s focus on the subjective motivation of the police represents a break with our usual

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that, *irrespective* of the good or bad faith of the prosecution, where evidence is material either to guilt or punishment, the suppression of such evidence violates due process. In *United States v. Augurs*, 427 U.S. 97 (1976), this Court held that the duty to provide material evidence to the defense is so basic that it exists, even in the absence of a specific defense request.

In *Killian v. United States*, 368 U.S. 231 (1961), this Court held that due process was not offended by an FBI officer's destruction of his original notes before transcribing them into an investigation report. However, the notes which had been destroyed had already been reviewed and evaluated by the FBI agent, and the defense was provided with an investigation report which was a transcription of the notes. Hence, although the *Killian* Court observed that the officer had acted in "good faith" and consistently with his normal practice in destroying the notes, the due process ruling there was based, not on the presence or absence of good faith, but rather on the fact that the officer had merely transcribed the evidence from one form to another before discarding the notes. *Id.*, at 234-240.

Similarly, in *California v. Trombetta*, 467 U.S. 479 (1984) although this Court noted that law enforcement officers had

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understanding that the presence or absence of constitutional error in suppression of evidence cases depends on the character of the evidence, not the character of the person who withholds it. (Citation to Augurs, *supra.*) Since *Youngblood* was decided, a number of state courts have held as a matter of state constitutional law that the loss or destruction of evidence critical to the defense does violate due process, even in the absence of bad faith." (Fisher, *supra* (Stevens, J., concurring).

acted in "good faith" in destroying breath samples from motorists who were charged with driving while intoxicated, the officers had already seized and tested the evidence before it was destroyed, and the defense had been provided with those test results. Hence, the focus in *Trombetta* was on the fact that the destroyed evidence was available to the defense in another form, not whether the police had acted in bad faith prior to its destruction.

In *Youngblood*, in contrast with *Killian* and *Trombetta*, the police had destroyed evidence *before* testing or evaluating it. Moreover, contrary to the *Youngblood* majority's suggestion, the defense had no alternative means of proving the defendant's innocence.[4] Furthermore, unlike *Killian* and *Trombetta*, where the police had acted both in good faith and consistently with sound, established police practice in destroying the evidence in question, the police officers in *Youngblood* had "negligently" destroyed the semen samples in question by failing to take the simple step of refrigerating them. *Id.*, at 337. Hence, and because police officers also discarded the defendant's vehicle without notice, "it would be disingenuous to suggest that the officers in *Youngblood*

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[4]Youngblood was convicted solely on the basis of a description by a 10-year old boy who selected the defendant's picture from a group of mug shots. Both the defense and the prosecution presented totally conflicting evidence. Because the police had disposed of the defendant's car, the automobile was not a viable source of conflicting evidence. Youngblood had already exhausted every available witness to corroborate his alibi. Therefore, short of the lost evidence, Youngblood had no alternative means of proving his evidence. See *State v. Youngblood*, 734 P.2d 592, 592-94 (Ariz. 1986) see also *Youngblood, supra*, at 342 (Blackmun, J., dissenting.)

were operating within standard police practice." Note, *Arizona v. Youngblood: Does the Criminal Defendant Lose His Right to Due Process When the State Loses Exculpatory Evidence?"*, 5 Touro L. Rev. 309, 319. Finally, in both *Killian* and *Trombetta*, the presence of good faith by the police had been only one factor in the court's decision, whereas in *Youngblood*, for the *first* time, this Court held that the defense could *only* establish a due process violation by demonstrating that the police had acted in bad faith.

In sum, *Youngblood* constituted a break with this court's prior precedent, because previous cases had established a duty to turn over material evidence to the defense regardless of bad faith; because prior cases in which this court had rejected due process challenges to the destruction of evidence had all involved testing, evaluation, and disclosure to the defense prior to destruction; because previous cases had all involved the police adhering to sound, established police procedures, whereas in *Youngblood* the police negligently destroyed evidence which was otherwise unavailable to the defense through any other means; and because Youngblood was the first and only case in which this Court had saddled the defense with the obligation to prove bad faith as condition precedent to the vindication of the due process rights of a potentially innocent defendant.[5]

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[5]This latter factor distinguishes *Youngblood* from *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Court held that a showing of bad faith is a pre-condition to a defendant's attack on a search warrant which resulted in the seizure of incriminating evidence. Because an attack on a search warrant would only be made where incriminating evidence had been discovered, *Leon* only applies to situations where the defendant is, as a factual matter, "guilty". In contrast, *Youngblood*'s bad faith requirement

2. Youngblood's holding has been thoroughly condemned by learned commentators, and has been rejected by more than one-fourth of the state courts around the country.

Since the 6-3[6] decision in *Youngblood,* there has been a steady stream of law review articles intensely critical of the *Youngblood* holding and its rationale. See, e.g., Bernstein, *Fourteenth Amendment - Police Failure to Preserve Evidence and Erosion of the Due Process Right to a Fair Trial,* **80 J. Crim. L. & Criminology 1256 (1990);** Finch, *"Oops! We Forgot To Put it in the Refrigerator": DNA Identification and the State's Duty to Preserve Evidence,* **25 J. Marshall L. Rev. 809 (1992);** Gordon, *Constitutional Law - Due Process - Failure of Police to Preserve Evidence Held Not to Be a Denial of Due Process of Law Absent Defendant's Showing Bad Faith on Part of Police,* **20 Cumb. L. Rev. 211 (1989);** Kaufmann, *Arizona v. Youngblood, State Advantage in Criminal Proceedings: The Ghost Is Real and the Haunting Continues,* **14 Okla. City U. L. Rev. 665 (1989);**

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potentially applies to defendants who are factually innocent.

[6]Justices Blackmun, Brennan, and Marshall dissented, expressing the view that can be summarized in the phrase: "The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial." *Id.,* at 61. Justice Stevens, although voting with the majority in *Youngblood,* observed that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Id.,* at 60 (Stevens, J.,concurring); see also fn.3, *ante.* Hence, in cases where the lost evidence is material and proving bad faith is impossible - which, Petitioner contends, is the situation in the instant case - *Youngblood* is perhaps more accurately viewed as a 5-4 decision.

Lembke, *The Role of Police Culpability in Leon and Youngblood*, **76 Va. L. Rev. 1213 (1990)**; Moore, *Arizona v. Youngblood: Does the Criminal Defendant Lose His Right to Due Process When the State Loses Exculpatory Evidence?*, **5 Touro L. Rev. 309 (1990)**; Paul, *Destruction of Exculpatory Evidence: Bad Faith Standard Erodes Due Process Rights, Arizona v. Youngblood*, **21 Ariz. St. L.J. 1181 (1989)**; Perlmutter, *Arizona v. Youngblood*, **24 Harv. C.R.-C.L. L. Rev. 529 (1989)** ["The majority's bad faith test dilutes the guarantees of due process by allowing police motive to define the substantive rights in an individual case."]; Comment, *Here Today Gone Tomorrow*, **48 Clev. St. L. Rev. 335 (2000)**; Dinger, *Should Lost Evidence Mean a Lost Chance to Prosecute? State Rejections of the USSC Decision in Arizona v. Youngblood*, **27 Am. J. Crim. Law 329 (2000)**.

Echoing the laments of these commentators, in a trend that began within just a few months of the announcement of *Youngblood*, no less than 25% of the nation's state courts have rejected the *Youngblood* holding on the basis that it denies defendants elemental due process rights. No less than thirteen states have held that the defendant need *not* make an absolute showing of bad faith on the part of the police in order to successfully challenge the destruction or loss of evidence, but that, instead, a balancing test is to be used to determine whether a due process violation has occurred: **Alabama**, see *Ex Parte Gingo*, 605 So.2d 1237 (Ala. 1992); **Alaska**, see *Thorne v. Dep't of Pub. Safety*, 774 P.2d 1326 (Alaska 1989); **Connecticut**, see *State v. Morales*, 657 A.2d 585 (Conn. 1995); **Delaware**, see *Lolly v. State*, 611 A.2d 956 (Del. 1992); **Hawaii**, see *State v. Okumura*, 894 P.2d 80 (Haw. 1995); **Idaho**, see *State v. Fain*, 774 P.2d 252 (Idaho 1989); **Massachusetts**, see *Com. v. Henderson*, 582 N.E.2d 496 (Mass. 1991); **Minnesota**, see *State v. Schmid*, 487 N.W.2d 539 (Minn.

App. 1992); **New Hampshire**, *see State v. Smagula*, 578 A.2d 1215 (N.H. 1990); **New Mexico**, see *State v. Riggs*, 838 P.2d 975 (N.M. 1992); **Tennessee**, see *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), **Vermont**, see *State v. Delisle*, 648 A.2d 632 (Vt. 1994); and **West Virginia**, *State v. Osakalumi*, 461 S.E.2d 504 (W.Va. 1995).

For example, as the Tennessee Supreme Court held in *State v. Ferguson, supra*: "Because we deem the preservation of the defendant's *fundamental right to a fair trial* to be a paramount consideration here, we join today those jurisdictions which have *rejected* the *Youngblood* analysis ..." *Id.*, 2 S.W.3d at 197 [emphasis added]. Tennessee and the other dozen states listed above have all determined that *Youngblood*'s all-or-nothing bad faith requirement is incompatible with the right to a fair trial, and that trend can only be expected to continue. See, e.g., Gertner, *Police Lose Evidence: Conviction Challenged Despite 'Good Faith'*, Law Weekly USA (Oct. 4, 1999), at 1 [trend is to "move away from bad faith" as exclusive test]; see also *State v. Morales, supra*, 657 A.2d 585, 593 (Ct. 1995) ["fairness" dictates that Youngblood rule be rejected].

Nevertheless, the instant case was tried in California – a jurisdiction in which, by law, the state court is forbidden from affording more constitutional protection to defendants than that afforded by this Court. See, e.g., *People v. Tierce*, 165 Cal.App.3d 256, 263 (Cal. App. 1985) [California's passage of Truth-in-Evidence provision requires that issue as to destruction of evidence "must be decided by virtue of the application of principles of federal law," citing *Trombetta, supra*]. Hence, for citizens in California, the nation's largest state, to the extent that *Youngblood* represents an aberration in this court's due process jurisprudence, only this Court can

fashion a remedy. Moreover, this Court must seriously question whether a rule that has been found to be unconstitutional in no less than one-fourth of the states is one that this Court should continue to require in the federal system and in those states where, as in California, state evidentiary standards are trumped by federal law.

3. Any conceivable practical benefits that the *Youngblood* rule may have had in 1989 have been thoroughly undermined by the DNA revolution occurring during the intervening 15 years.

The advent of DNA identification has revolutionized the crime-solving process, making it possible now for stored evidence to be tested with enough accuracy to inculpate a guilty defendant or exonerate an innocent one. Indeed, using DNA testing of evidence which had previously been stored, hundreds of defendants previously convicted have been cleared, many of them in capital cases. The sea change in crime-solving techniques brought about by the DNA revolution has changed forever the equations which applied when *Youngblood* was decided in 1989.

Back in 1989, DNA testing was in its infancy.[7] In the intervening 15 years, however, DNA testing has been used in countless cases throughout this country and worldwide. This fact alone renders the *Youngblood* analysis obsolete in today's post-DNA world:

The Court which established the *Youngblood*

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[7]The first use of DNA testing occurred in 1985, at the University of Leicester in England. The first U.S. conviction using DNA typing occurred in Florida in 1987, just two years prior to the announcement of *Youngblood*. See 25 John Marshall Law Rev. 809, *supra*, at 828.

> standard faced factual circumstances which did not properly consider the advent of DNA fingerprinting. The criminologist in *Youngblood* tried to obtain blood group substances from the victim's clothing using the P-30 (protein molecule tests) and ABO technique. These procedures do not have the same specificity as DNA fingerprinting. *Thus biological samples taken from the crime scene contain a greater exculpatory value than they did in the past. Logically, a failure to preserve biological samples has greater consequences than at the time the* Youngblood *Court established its duty to preserve evidence. Therefore, a new standard taking into consideration the establishment of DNA identification should be formed.*

25 John Marshall L. Rev. 809, *supra*, at 832 [emphasis added]. The above observation was made back in 1993, more than a decade ago and prior to the hundreds of post-conviction exonerations which have come in the wake of the DNA revolution. In the meantime, the obsolescence of *Youngblood* has grown exponentially.

Indeed, the DNA revolution has removed one of the principal policy justifications advanced by the *Youngblood* majority in support of its holding: i.e., that the bad-faith requirement "limits" the police's duty to preserve evidence "to reasonable bounds and *confines it to that class of cases where the interests of justice most clearly require it*, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Youngblood*, at 58. In the wake of the DNA revolution, where a single blood sample can exonerate a defendant regardless of what would have been considered "overwhelming" evidence of guilt in the pre-DNA era, the

"justice" which the *Youngblood* majority spoke of now requires that blood evidence be collected in *every* case - not just those in which the police happen to act in bad faith. Furthermore, in terms of the cost to the police in particular and to the public in general, nothing is *more* expensive than having a defendant tried, convicted, and the sentence affirmed on appeal - only to have the entire process unravel on the basis of DNA testing that produces an acquittal many years down the road on habeas corpus. In comparison, requiring the police to preserve blood evidence in every case and turn it over to the defense during pre-trial discovery - something that is not required by *Youngblood* - would reduce the ultimate cost to society by several orders of magnitude.

In sum, whatever "practical" benefits may have been derived in 1989 from a rule discouraging police from collecting and disclosing blood evidence to the defendant have been utterly obliterated by the DNA revolution.

4. Requiring a defendant to prove bad faith on the part of the police following the destruction of material evidence places a virtually impossible burden on defendants, which will necessarily result in innocent persons being denied the constitutional right to present a defense.

Charles Whitehead, a criminal law instructor at the FBI Training Academy, has said:

> It is virtually impossible for defendants to prove bad faith when police lose evidence, so the [*Youngblood*] ruling means that if police feel like preserving [evidence] they will and if they don't, they won't.

Kamen, *Police Not Bound To Save Evidence, High Court Says: Rights of Criminal Suspects Further Narrowed in Sexual Assault Case*, Wash Post, Nov. 30, 1998, at A4. The rationale for the

FBI instructor's conclusion is readily seen. *Youngblood* presupposes that the evidence that has been destroyed was originally in the unencumbered possession of the police. Hence, and lacking access to the evidence itself, the defense presumably must show bad faith by calling the investigating officers as witnesses and getting them to admit that they destroyed the evidence in order to get an innocent defendant convicted. [8] How can a defendant reasonably be expected to do *that* in the real world?

Short of getting a police officer to admit to intentional destruction of exculpatory evidence, the defendant could only show bad faith by independently proving through other, available evidence, that the police knew the destroyed evidence was material. However, if the defendant could accomplish that with independent evidence, s/he wouldn't have any need for the destroyed evidence in the first place. Thus, and given that the defendant has the burden of proof, "it is unlikely that any defendant who actually needs the protection [from police bad faith] will ever be able to satisfy the standard." [9] 76 Virginia L. Rev. 1213, at 1223.

In sum, in virtually any case in which a defendant needed protection from the police's destruction of material

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[8]Destruction by police of evidence known to be exculpatory would be a serious crime in most jurisdictions. See J. Garelick, *Destruction of Evidence* § 6.8, at 20 (Supp. 1989).

[9]In a study done in 2000, the author was only able to find three post-*Youngblood* cases in the entire country where a showing of bad faith had been successfully made. 48 Cleveland St. L. Rev. 335, 350, citing *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993); *United States v. Bohl*, 25 F.3d 904, 911 (10th Cir. 1994); *Stuart v. State*, 907 P.3d 793 (Idaho 1995).

evidence, *Youngblood*'s bad faith requirement makes it virtually certain that the defendant will never be able to get it. This kind of "Catch 22" approach to justice virtually guarantees that innocent defendants will be going to prison, thereby sacrificing basic constitutional rights in the name of relieving police of responsibility to solve crimes, which in turn undermines public faith in the judicial system:

> ... [T]he bad faith requirement is inappropriate because the Court is focusing on relieving the police of responsibility at the expense of invaluable individual due process rights .... Reducing the burden on the nation's already overextended police forces is a noble gesture. But to do so by sacrificing an individual's right to due process is a monstrous abuse of judicial power. Due process guarantees fairness at trial, no more, no less. It is the duty of the Supreme Court to guard and protect that doctrine. After *Youngblood*, innocent defendants will be going to prison because the Supreme Court has declared it acceptable for the police to lose or destroy exculpatory evidence, so long as they do it in good faith. Thanks to the Bill of Rights, Americans have come to expect fair dealings in the nation's court systems. *Youngblood* undercuts the faith that the public has in the judicial system.

5 Touro L. Rev. 309, at 321.

5. The Youngblood rule encourages police incompetence in the collection of potentially critical blood evidence.

Youngblood's all-or-nothing bad faith standard focuses solely on the motive of the investigating officers rather than on the materiality of the destroyed evidence. Hence, no

matter how important evidence may prove to be to the defense - especially blood evidence that can make or break a defense or prosecution case - the police can lose it with impunity.

> Such a standard condones police incompetence by providing no incentive for police to carefully preserve highly informative and possibly exculpatory evidence. Although the *Youngblood* standard eases the burden on investigators, it inherently threatens the level of diligence used during inquiries into the identity of perpetrators.

25 John Marshall L. Rev. 809, *supra*, at 832.

Although police incompetence in the collection of blood evidence was arguably acceptable in 1989, it is simply inexcusable in the DNA era. Now, proper handling of blood evidence can bring about a successful search for the truth, whereas laziness and incompetence in the collection of that evidence can result in the real perpetrators going free while an innocent defendant is convicted. The public expects and deserves due process standards which reward and encourage police work of the caliber as that shown on TV programs such as "CSI". *Youngblood*, however, encourages the opposite: sloppiness and gross mishandling of evidence without any incentive for police excellence or sanctions for police incompetence.

6. *Youngblood* requires the dismissal of charges where the police have engaged in provable bad faith, even if the defendant is guilty.

The *Youngblood* test is not only too narrow - requiring a showing of bad faith that few innocent defendants will ever be able to make - but it is also too broad. In the hypothetical instance in which a defendant could actually show bad faith

in the loss or destruction of evidence, the only remedy sanctioned by *Youngblood* is the outright dismissal of the charges. In other words, assuming that the *Youngblood* test is at least theoretically possible to meet, where it is met the charges must be dismissed, because there is no other, lesser remedy provided by *Youngblood*'s so-called bright line rule. Accordingly, *Youngblood* is perhaps the worst of all possible constitutional tests: On the one hand, it provides for the conviction of innocent people who cannot prove subjective bad faith on the part of the police in the destruction of evidence material to the defense. On the other, it requires the release of persons who can manage to satisfy the bad faith requirement even if they are, in fact, guilty.

7. A balancing test would overcome the serious problems with the *Youngblood* test while retaining the relevance of police good faith as an important consideration in the due process analysis.

In searching for a potential replacement for the Youngblood test, one need look no further than sitting Justice Kennedy's concurring opinion in *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979). In *Loud Hawk*, Justice Kennedy set forth broad principles to be applied to loss or destruction-of-evidence cases. Judge Kennedy focused on the conflicting interests which must be protected in such cases, finding that "the significant interest ... is to avoid the impairment of judicial integrity that would occur if the prosecution were allowed to manipulate court processes," and opined that protective rulings or sanctions might be necessary to "insure a fair trial in a specific case and to deter future violations." *Id.*, at 1151 et seq. (Kennedy, J., concurring, supported by 5 other members of the en banc court).

The factors to be balanced under the *Loud Hawk* test are

(a) the quality of the government conduct; and (b) the extent to which the accused may be prejudiced by that conduct.

Inquiries regarding the quality of the government's conduct include: (1) whether the evidence was in government custody when it was lost or destroyed; (2) whether the government's actions disregarded the accused's interests; (3) whether the government negligently disregarded established and reasonable standards of care for police and prosecutorial functions; (4) if deliberate, whether the government's acts were in good faith or reasonably justified; (5) whether prosecutors were involved in events leading to the loss or destruction of the evidence.

Factors relating to the extent of prejudice to the defendant include: (1) the importance of the evidence in establishing the elements crime charged and the motive or intent of the defendant; (2) the secondary or substitute evidence's probative value and reliability; (3) the probable weight of the factual inferences or proof lost to the accused; and (4) the effect of the absence of the evidence would likely have on the jury, such as unfounded speculation or bias.

Significantly, adoption of such a flexible approach would still allow for "bad faith" to be fully factored into the analysis. However, bad faith would be *one* of many factors to be considered, not the sole and determinative factor. In addition, the balancing approach would have all of the following advantages over the *Youngblood* all-or-nothing approach to bad faith:

- It would allow for a test flexible enough to be adopted on a nationwide basis, thus eliminating the wide variances in due process, based solely on the state in which a defendant happens to be prosecuted.
- The "fundamentally unfair trial" envisioned by Justice

Stevens' concurrence in Youngblood would be far less likely to occur.

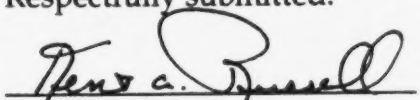
- A balancing test would eliminate the inherent unfairness in forcing a potentially innocent defendant to prove bad faith as to evidence exclusively controlled and handled by the police, while allowing for a more flexible remedy than dismissal in those cases where a "guilty' defendant manages to prove bad faith.
- It would encourage the police to do a more through and competent job in collecting physical evidence which can be conclusive in proving or disproving innocence – especially blood evidence that can be subjected to definitive DNA testing.
- Costs to the police in particular and to society in general would be reduced by focusing the collection and analysis of blood evidence at the trial and discovery phase of a criminal prosecution, rather than on habeas corpus, which must be resorted to when the justice system fails to protect innocent defendants from due process violations by the State.

CONCLUSION

Based on the foregoing, this court should grant the Petition for Writ of Certiorari and order full briefing.

Dated: March 1, 2004.

Respectfully submitted:



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Appendix A

FILED
FEB. 7, 2000

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
ARMANDO V. MUNOZ,
Defendant and Appellant.

F027339
(Super. Ct. No. 66910A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Michael R. Snedeker, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Louis M. Vasquez and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

On June 12, 1996, an information was filed in the Kern County Superior Court charging Armando Vincent Munoz

(defendant) with the murder of Terry Silva (Silva) (Pen. Code, § 187, subd. (a)[1]; count one); the attempted murder of Andres Gonzales (Gonzales) (§§ 664/187(a); count two); and the attempted murder of Nathan Charles (Charles) (§§ 664/187(a); count three).

It was further alleged as to count one: the offense was a serious felony within the meaning of section 1192.7, subdivision (c)(1); defendant personally used a knife in the commission of the offense within the meaning of section 12022, subdivision (b)(1); and defendant personally used a firearm in the commission of the offense within the meaning of section 12022.5, subdivision (a)(1). With respect to count two, it was further alleged: the offense was a serious felony within the meaning of section 1192.7, subdivision (c)(9); defendant personally used a knife within the meaning of section 12022, subdivision (b)(1); and defendant inflicted great bodily injury upon Gonzales within the meaning of section 12022.7, causing the offense to be a serious felony within the meaning of section 11-92.7, subdivision (c)(8). Lastly, as to count three, it was further alleged: the offense was a serious felony within the meaning of section 1192.7, subdivision (c)(9); and defendant personally used a firearm within the meaning of section 12022.5, subdivision

On August 21, 1996, an amended information was filed which, in addition to the three counts above, charged defendant with assault with a deadly weapon upon Gonzales (§ 245, subd. (a)(1); count four); and assault with a gun upon Charles (§ 245, subd. (a)(2); count five). Regarding count four, it was alleged defendant personally inflicted great bodily injury upon Gonzales within the meaning of section 12022.7. With respect to count five, it was also alleged defendant personally used a firearm within the meaning of

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[1]Unless otherwise stated, all further statutory references are to the Penal Code.

section 12022.5, subdivision (a)(1). As to both counts four and five, it was further alleged the offenses were serious felonies within the meaning of section 1192.7,subdivision (c)(8).

On June 28, 1996, defendant filed a common law motion to dismiss on the ground law enforcement personnel intentionally destroyed evidence, and a motion to set aside the information pursuant to section 995. The court denied both motions after a hearing on July 10, 1996. Defendant's motion to reconsider his motion to dismiss was denied on August 20, 1996.

Defendant's trial began on August 21, 1996. Subsequently, on August 26, 1996, defendant filed a motion for sanctions based on outrageous police and/or prosecutorial misconduct. The court heard and denied the motion on September 3, 1996, finding there was no misconduct.

On September 24, 1996, defendant made a motion pursuant to section 1118.1 for a directed verdict as to counts one through three, contending the evidence was insufficient to show deliberation and premeditation. After hearing argument the court denied the motion, finding there was sufficient evidence to sustain a conviction with respect to all three counts.

On September 26, 1996, the jury returned its verdict, finding defendant guilty on all five counts. The jury also found all the additional allegations to be true. On October 25, 1996, defendant filed a motion for new trial. On November 7, 1996, the motion was heard and denied, along with defendant's request for modification of the verdict.

Defendant was sentenced on November 7, 1996. The court found defendant statutorily ineligible for probation, then sentenced defendant to a term of 25-years-to-life on count one, plus 11 years in enhancements. On counts two and three, defendant was sentenced to life with the possibility of parole, with an additional four years in

enhancements on count two, and three years in enhancements on count three. Count two was ordered to be served consecutive to count one, and count three was ordered to be served consecutive to count two. The sentences on counts four and five were stayed pursuant to section 654.

Defendant now appeals contending: 1) his right to due process was irreparably harmed by the failure of officers at the scene to collect evidence they had reason to believe would have exculpated him; 2) the evidence was insufficient to establish he attempted or committed first degree murder; 3) collateral estoppel precluded the prosecution from attempting to relitigate whether defendant was engaged in a drug transaction; 4) prosecutorial intimidation of defense witnesses requires reversal; 5) the prosecutor prejudicially trivialized the gravity of the jury's task in closing argument; and 6) the judgment must be reversed because it was tainted by jury misconduct.

FACTUAL HISTORY

On May 17, 1996, defendant, Gonzales, and Erika Munoz (Munoz)[2] were living together in defendant's two-bedroom apartment in Hollister. Gonzales, who had known defendant for approximately 12 years, had been staying with defendant for a few weeks prior to May 17, 1996. Munoz, who was dating and living with defendant's cousin, Ralph, began staying with defendant only a couple days prior to May 17, 1996, after she had an argument with Ralph.

According to Gonzales, on May 17, 1996, he, defendant, and Munoz set off for Los Angeles to deliver a car. Gonzales agreed to go along without asking the purpose of the trip, because he owed defendant a favor. Defendant and Munoz were driving a white Toyota, and Gonzales followed in a blue van he had recently bought from defendant. He

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[2]No relation to defendant.

purchased the van for $5,100, and paid defendant a down payment of $1,600, but had yet to make any additional payments. Inside the van, Gonzales carried a box of .22 long-rifle bullets, and a .357 gun that Gonzales stated defendant handed to him just before they left on their trip.

The group left Hollister, stopping in Los Banos to get something to eat, then proceeded south on Interstate 5. Gonzales continued following defendant and Munoz, and they pulled into a rest stop located near Buttonwillow at approximately 10:30 p.m. At the rest stop, defendant informed Gonzales he wanted to stop in Buttonwillow because it was late, and he preferred to get an early start the next morning.

The group eventually checked into two adjoining rooms (rooms 237 and 238) at the Motel 6 in Buttonwillow, with defendant paying for both rooms. Upon entering the rooms, defendant took a "kits item" and walked around the room with the item in his extended hand. It was later determined the "kits item" was a "bug detector" owned by defendant.

Shortly after checking in, Gonzales went to a nearby store for milk and sodas for the group. Upon returning, Gonzales stated he, defendant, and Munoz, all smoked two marijuana cigarettes in room 238. Gonzales additionally admitted ingesting cocaine two days earlier. After smoking the marijuana, they watched television in room 238, after which Gonzales became tired and went to room 237 to sleep. Gonzales kept a loaded .22 handgun with him in room 237, wrapped in a blanket on the bed. According to Gonzales, he gave defendant the .357 gun he carried in the van and defendant handed him the .22 handgun.

After falling asleep, Gonzales was awakened by loud, banging noises coming from room 238. Although he tried to go back to sleep, Gonzales eventually heard a knock on the closed, adjoining door. Gonzales opened it and saw defendant on top of Munoz, holding her near the neck with

an arm up as if he was going to strike her. Gonzales asked what was going on, and defendant got off Munoz. Munoz then walked over, and stood behind Gonzales. Defendant began rubbing his head, and pacing the room. He then went into the bathroom, drank some milk, and pulled out his knife, stating, "This is not happening."

After defendant pulled out the knife, Gonzales grabbed for it with his left hand, cutting three fingers. Defendant, however, pulled the knife away, and stabbed Gonzales in the left shoulder. Defendant and Gonzales continued to struggle, eventually falling between the two beds, with defendant on top of Gonzales. Defendant stabbed Gonzales seven times in the left shoulder and wrist, back, chest, stomach, and right knee, while Gonzales screamed for help.

At some point, defendant got off Gonzales and went to the doorway of room 238 to go outside. Gonzales looked up and saw the back of defendant, who had hold of Silva. Gonzales observed defendant punching Silva with his right hand, and pushing Silva backward. Gonzales got up, went through the adjoining door, and left room 237. Once outside, Gonzales could tell defendant was stabbing Silva in front of room 238. Gonzales went downstairs into the motel office for help. Once inside, Gonzales heard gunshots.

On cross-examination, Gonzales admitted telling the police he knew nothing about the .357 handgun, and that both guns belonged to defendant. Gonzales also indicated he never had the knife in his hand at any point during the struggle in room 238.

Munoz testified defendant told her they were going to Los Angeles, and similarly recounted the trip to Los Banos for food before heading toward Los Angeles. Munoz indicated defendant never told her the purpose of the trip, or mentioned anything about buying land. She wanted to get away and not think about her recent break-up with her boyfriend.

Once at Motel 6 in Buttonwillow, Munoz stated the group started watching television in room 238 with defendant on one bed, her on the other bed, and Gonzales sitting on a chair. She testified that defendant and Gonzales smoked marijuana, but denied smoking any herself. After awhile, Gonzales got up and walked through the adjoining doors into room 237.

According to Munoz, defendant suddenly became upset, arose from the bed, and began pacing back and forth telling Munoz she was "messed up" and "fucked up." Although Munoz kept asking defendant what she had done to make him angry, defendant just kept pacing back and forth. Defendant then removed his knife from its pouch, and came toward Munoz. Once he got close to Munoz, however, defendant put the knife away and told her he was sorry. Defendant then walked toward Munoz, telling her he wanted to give her a hug, but when he got within two and a half feet of her, he again removed his knife. Defendant then grabbed Munoz by the hair, and threw her onto the bed farthest from the door. Munoz was on the bed with her knees to her chest, continually asking defendant what was wrong, while defendant grasped her hair.

At some point, Gonzales entered the room through the adjoining door. Gonzales asked defendant what he was doing, and defendant proceeded to get off Munoz and began pacing back and forth. Munoz got off the bed and walked to the right side of Gonzales, so that Gonzales was between her and defendant. As Gonzales was trying to calm defendant down, Munoz noticed defendant begin to breathe heavily, and she then saw him swing his right hand toward Gonzales. When she saw defendant swing his arm, Munoz ran out through the front door of room 237.

Munoz ran downstairs to the motel office, where three men were standing at the night window. Munoz stated she was "hysterical," and kept telling the people at the office to

call the police. An inner glass door leading to another office was eventually opened by a man Munoz believed to be the manager, and she ran inside, where she encountered two women. One of the women initially would not let Munoz use the phone, but she eventually was able to call a friend, Brian Keyser, who picked her up.

Munoz admitted she lied to police about where Gonzales was when defendant first became upset. She lied because she was afraid of what others would think if she admitted to being alone in the room with defendant, since his cousin was her boyfriend and defendant was married. Munoz also admitted lying to police about the drive from Los Banos. Munoz told police she was in the van with Gonzales, again so people would not think there was something going on between her and defendant. Munoz also admitted seeing the $15,000 spread out on defendant's counter, but denied seeing him count the money.

Munoz further testified that when Keyser picked her up, there were two other males in the car. Because of their presence, Munoz did not tell everything that happened in the motel. Munoz later, however, told Keyser the whole truth. She also indicated that on July 9, 1996, her boyfriend's house was vandalized, along with his car, with the words "whore," "dirty bitch," "your time is here," and "Ericka has AIDS," spray painted on the house.

Richard Freier, a schoolteacher, testified he stayed at the Motel 6 on the night of the incident. Freier was awakened by a male voice shouting "Jesus Christ" over and over, then after a short pause, Freier heard the same voice say "I'm sorry" a number of times. Freier looked out his window, and noticed the door to room 238 was open. Freier saw a man with dark hair, a red shirt, and black pants leave the room with a gun in hand. Freier noticed a hand raise up from a person on the ground, at which point defendant turned and fired the gun. According to Freier, the gun was fired once, then after a short

pause, two to three more times.

Freier then saw the man return inside room 238, when he heard two more bangs, after which the man left room 238 and began pacing back and forth. The man stated "we need to get out of here," walked back into room 238, and left with a big bag. Freier further testified the man, who appeared very much in control of his actions, proceeded to step over the person on the ground, and walk down the stairs. Freier then heard a car start, wheels squeal, and two crunch sounds. Freier later saw a bloody knife in a grassy area near the pool under room 238.

Charles, an 18-year-old who worked for a mobilehome wholesaler, was traveling on a job with his boss, Jay, a coworker, Billy, and two Dobermans. The three checked into room 258 at the Motel 6 late in the evening on May 17. Charles admitted to smoking a small amount of marijuana in the room, but did not feel it affected his ability to observe anything. Charles was in the room when he later heard a man yelling. He poked his head outside, and saw defendant "viciously" beating Silva. According to Charles, defendant was repeatedly picking Silva up with his left hand and striking him down with his right hand. Charles saw Silva putting his hands up, trying to cover his face, and heard him say, "I'm not going to die; You're not going to kill me," a few times.

Charles yelled "hey" toward defendant in an effort to get him to stop. Defendant looked up at Charles, and ran back into room 238. Charles then went over to Silva, still on the ground and covered in blood, who told Charles "five or six times" to get his brother in room 147. After what Charles estimated to be 15 seconds, defendant subsequently came out of room 238, holding a gun. While Charles knelt beside Silva, defendant pointed the gun in their direction and fired. Charles saw the first shot, which appeared to go into Silva's chest. Before Charles could get up and begin to run, he saw

two additional shots from the gun, one of which he felt go by his leg. Charles ran back to his room, and heard three additional shots fired.

Once inside his own room, Charles looked out his window, and saw defendant go back inside room 238 and calmly leave, down the stairs. Defendant went to a white car in the parking lot, and laid on the ground with his hand behind his head. After three or four seconds, defendant got into the white car. Charles then heard the car speed away, followed by a crash.

Randy Blankenship, a restaurant general manager, was staying at Motel 6 for the night, on his way to Los Angeles. Blankenship was standing at the office window with his brother shortly after 1:30 a.m., checking in, when a frightened young Hispanic girl walked in saying, "I need help. Somebody help. Somebody has been hurt." Very shortly afterward, Gonzales staggered into the office area bleeding. Blankenship, his brother, and a third man physically assisted Gonzales first behind a vending machine, then behind an ice machine.

Gonzales indicated he was thirsty, so Blankenship went to his truck to grab a soda. As he was unlocking his truck, Blankenship heard six shots. After the gunshots stopped, Blankenship ran back inside the office lobby. The young Hispanic female returned, indicating someone else had been injured. Blankenship went upstairs, where he found Silva lying on the ground, badly injured.

James Riling, an auto mechanic, was a guest at Motel 6, along with his girlfriend and her son. From the landing outside his room, room 140, Riling was able to look up and see rooms 237 and 238. After falling asleep, Riling was awakened by his girlfriend, who informed Riling of screaming and yelling coming from outside. Riling walked outside his room, into a grassy area near the pool, looked up and saw a man standing there screaming. According to

Riling, the man was "in a rage."

Riling returned to his room to put his shoes on, and while his stepson held the curtain open, Riling heard and saw five or six shots in rapid succession. Riling put his shoes on, and went outside. There he noticed the same man who earlier had been screaming, calmly walking across the balcony and down the stairs, with what appeared to be a brown bag in his hand. Riling's girlfriend then pulled him back into the room, and Riling noticed a white car driving away.

After the car drove away, Riling looked up to the balcony area, and noticed a man hanging onto the railing and screaming for help. Riling went upstairs to help the man, and was the first person on the scene. The man asked Riling to get his brother. Riling had the man lay down, and noticed he had "major injuries." Riling stepped into room 238 briefly to make sure no one else was there, and noticed a gun with its chamber open laying on the bathroom carpet, as well as blood all over the wall. Riling also noticed a knife on the grass below room 238.

Donna Esty, Riling's girlfriend, testified she heard screaming and what sounded like fighting, so she went outside to see what was happening. Esty looked up toward room 238, and saw defendant shaking his right hand and yelling. Esty stood and watched for two or three minutes, then went back inside her room. While there, she heard five or six shots, one right after the other. Esty stood at her door and saw defendant come out of the room upstairs, lift his legs as if stepping over something, and go down the stairs with something in his hand. Esty observed defendant leave in a white Toyota. At some point Esty went to the hotel office area, where she saw a young, Hispanic girl with a blanket wrapper around her, who appeared terrified.

John Hartman works for the Kern County Sheriff's Department as a deputy helicopter pilot. On the night of the incident, Hartman was dispatched to look for a "light colored

vehicle ... headed out 58 westbound." Hartman located a single car in the vicinity, approximately three-to-four miles from the Motel 6. The vehicle was stationary, in a field off the side of the road. According to Hartman, it appeared the subject was "either naked or had underwear on" and was "on the hood of the vehicle." Hartman placed a spotlight on the vehicle, at which point the subject got up and walked further into the field.

Kern County Deputy Sheriff Heriberto Flores initially reported to the Motel 6, but was later instructed to go where air support had located a vehicle. Upon arriving, Flores found a white compact car. The highway patrol was already there, holding the suspect at gunpoint. Flores identified defendant as the suspect. Flores approached defendant, who was naked and lying on his back with his hands folded across his stomach. Flores ordered defendant to roll over and put his hands behind his back, to which defendant responded, "Don't fucking touch me." Flores eventually pepper-sprayed the defendant to get him to comply, and placed him under arrest.

Brenda Smith, a criminalist at the Kern County Regional Crime Lab, analyzed items seized for blood and compared them to the control blood samples of defendant, Gonzales, and Silva. A sample of blood taken from the paint can could have come from defendant, but not Gonzales or Silva. The blood sample taken from the blade of the knife could have belonged to Silva, but not defendant or Gonzales. The blood sample taken from the handle of the knife, however, could only have come from defendant, and not Gonzales or Silva.

Smith took three representative blood samples from the .357 handgun. Samples taken from one side of the gun could have come from defendant, but not Gonzales or Silva. The sample taken from the side of the gun with the cylinder release could have come from Silva, but not defendant or Gonzales. According to Smith, the side of the gun possibly

containing blood from Silva was more of a spatter pattern then just a layer of blood. This pattern was the possible result of Silva being shot at close range, and the blood splashing back onto the gun. Smith also took blood samples from defendant's jeans. Smith was able to exclude defendant and Gonzales as possible donors of the blood, but Silva was included as a possible donor.

Smith also analyzed some gauze swabbings taken by the sheriff's department. The sample taken from between the beds in room 238 could have come from Gonzales, but not defendant or Silva. The sample taken from the threshold, where the adjoining doors were located between rooms 237 and 238, could have also come from Gonzales, but not defendant or Silva. Smith indicated the larger blood spots in the photograph of the threshold appeared to be vertical drops, as if someone was standing there dripping blood, while the smaller spots were likely the result of movement. Smith further testified the blood samples taken from the backpack and the holster were inconclusive.

Although Smith did not go to the crime scene, she testified that had she gone, she likely would have taken five to ten more samples from different areas. On cross-examination, Smith indicated the photographs taken at the scene were not adequate to do proper blood spatter interpretation, and the lack of proper photographs hampered her ability to do any significant blood spatter interpretation.

Dr. George Mowry, an emergency physician at San Joaquin Hospital, treated Gonzales on the day of the incident. According to Mowry, when brought in, Gonzales had a life-threatening hemorrhage. Mowry testified that Gonzales' hand injury was consistent with Gonzales grabbing a knife. Mowry also indicated that an injury to the palm would be consistent with that person having control of a knife, and in the course of stabbing, hitting a hard surface and causing the hand to slip over the blade of the knife.

When Gonzales was first brought into the hospital, Mowry believed Gonzales was "intoxicated on something."

Detective Jim Christopherson of the Kern County Sheriff's Department was the lead detective assigned to this case. Based on his experience, Christopherson referred to this as a "heavy eyewitness" case. Christopherson specified the general vicinity from which blood samples were taken in room 238, and also decided which pieces of physical evidence would be seized.

Although he could have called the district attorney crime lab onto the scene, Christopherson decided not to based on the information received from numerous eyewitnesses. Christopherson had information that both male subjects in the room had been cut, both had bled profusely, and based on the violent nature of the act, the location of the blood did not warrant the expenditure of calling out the crime lab. Christopherson later elaborated the location was insignificant because the blood spatters would not have told him who the actual aggressor was in the incident. On cross-examination, Christopherson said at the time, the number of blood samples taken was adequate for forensic purposes.

Jim Ray, a technical investigator for the Kern County Sheriff's Department, testified he responded to the motel at approximately 3 a.m. to take photographs, and to collect physical evidence. According to Ray, the technical investigators work at the direction of the homicide detectives.

Dr. Armond Dollinger, a forensic pathologist, performed the autopsy on Silva. According to Dollinger, Silva died as a result of internal bleeding caused by penetrating stab wounds to the chest. When asked if there were "other conditions ... recited as cause of death," Dollinger noted multiple stab wounds, incised wounds, and gunshot wounds.

Defense Case

Defendant testified on his own behalf. According to defendant, a couple weeks before the incident, he mentioned to Gonzales that he was going to view some property, and Gonzales indicated a desire to go along. On May 17, 1996, defendant informed Gonzales "today was the day" if he still wanted to go. Defendant also asked Munoz if she wanted to go, and she said yes.

Gonzales took defendant to his grandfather's house, where he borrowed his aunt's white Toyota. Defendant left Hollister with approximately $15,400 in cash. Prior to leaving, defendant counted and bundled the money at his apartment. Present while he was counting the money were Gonzales, Munoz, and defendant's neighbor, Todd Alnes. Defendant further indicated both Gonzales and Munoz were in a position to view the money while it was being counted.

Defendant and Gonzales took two cars because Gonzales had something to take care of prior to their leaving. Defendant met Gonzales in Los Banos, where they ate and fueled their vehicles. The three then headed south on Interstate 5. Defendant admitted carrying a knife, but denied carrying any guns or ammunition.

Defendant testified he was going to Dos Palos for a meeting with Ricardo Ortiz on May 18, 1996, which had been set up three to four weeks prior. Ortiz owned property and wanted to sell it for between $12,000 and $18,000. Ortiz had previously shown defendant a deed and video of the property.

As they left Los Banos, Munoz drove the white Toyota while Gonzales drove the blue van. Defendant rode in the Toyota with Munoz, and fell asleep. He woke up and instructed Munoz to pull off into a rest stop less than a mile from Buttonwillow. Defendant changed positions with Munoz, and drove up next to the van to see if Gonzales wanted to stop at a motel.

Defendant exited in Buttonwillow, and after first checking for rooms at an Easy 8 Motel, he eventually paid for two rooms at Motel 6, rooms 237 and 238. After entering room 238, Gonzales "[rolled] a joint." Defendant then asked Gonzales to get the group some cigarettes and drinks.

Gonzales returned 15 minutes later with juices, milk, and cigarettes. The three began watching television, with defendant on the bed closest to the bathroom, while Gonzales joined Munoz, sitting on the other bed. At some point defendant fell asleep, but was awakened by Gonzales who asked if he could smoke another joint. After telling Gonzales to "go ahead," defendant rolled over and tried to go back to sleep. Later, defendant got up and told Munoz and Gonzales to go into the adjoining room because they were making too much noise. Defendant turned off the television in room 238, Munoz and Gonzales went into room 237, and defendant returned to bed.

Defendant alleged he was again awakened, this time by the sound of Gonzales rummaging through defendant's backpack. He asked Gonzales what he was doing, to which Gonzales replied, "You know what I am doing." Defendant then asked what Gonzales wanted, and Gonzales responded, "You know what I want." At that point, Gonzales swung a knife at defendant. Defendant put up his hand to protect himself, and was cut. The two started fighting, and Gonzales stabbed defendant twice under the arm. The struggle eventually moved between the two beds, where defendant was able to get the knife away from Gonzales. Defendant, who felt "scared for my life," began stabbing Gonzales.

Defendant subsequently noticed a man walk into the room. Defendant jumped up from his position over Gonzales, and tried to tackle and wrestle the man, stabbing the man twice in the back of the leg. Defendant did so because he believed the man was there to help Gonzales. Defendant continued striking and stabbing the man with

both hands, and the struggle eventually made its way outside to the balcony. Defendant did not hear the man say anything, but defendant indicated he was yelling, "I'm sorry," that he did not want to die, and that the man was going to kill him.

At some point, defendant thought the man was going to throw him over the second floor balcony, so defendant grabbed for the railing and dropped the knife. Defendant could not recall whether he stabbed the man in the face or continued striking him, picking him up, and striking him down again.

When the fight on the balcony stopped, defendant went back into room 238. He noticed a revolver in a holster, removed the gun, and returned to the balcony. As defendant left the room, he looked to the right, then to the left. As he looked left, he was startled by Charles, and the gun "went off." Charles began running away from defendant, and after Charles rounded a comer, defendant fired three more shots in Charles's direction. Defendant claimed he fired these shots to "make sure [Charles] kept running, got out of the area, maybe he would go call the cops or something."

Defendant turned and walked back toward the man on the balcony, who was now "doing something." Defendant shot the man two times, returned to room 238, grabbed his bag and left. Defendant stated that when he left he was "afraid for his life" and "just wanted to get out of there" because he did not know Gonzales's location.

Defendant got into the white Toyota and drove away. After leaving the motel, defendant "kind of like blacked out," and woke up crashed in a field. He was eventually confronted by authorities, and taken to a hospital.

Sylvia Cuevas, a full-time student, testified she purchased a 1992 Honda Accord from defendant on May 2, 1996. While the Department of Motor Vehicles documents indicated a sale price of $16,500, Cuevas stated she only paid

$16,000 for the vehicle. She paid defendant the entire amount in cash, and must have made a mistake on the documents because she was "in a hurry." Defendant testified he sold the car to Cuevas for $16,500. He further stated he required the sale be in cash because he had previously sold the car to a man named Leo, who only paid defendant $5,000, causing defendant to repossess the vehicle because "checks bounce."

When interviewed by police, Cuevas refused to say from whom she borrowed the money. She testified she acquired the $16,000 by borrowing from four different people: Her two sisters each loaned her $2,000; her friend, Rafael Moreno, a "business guy" from Tijuana, Mexico, whom Cuevas had known for "a couple of months, maybe a year," loaned her $8,000; and Juan Garcia, a biochemist from Stockton, loaned her $4,000.

Robert Clark testified he owned property in California Valley, located in the eastern part of San Luis Obispo County, near the Kern County line. Clark sold the property to Ortiz, and personally prepared the grant deed, the deed of trust, and note in order to transfer title. Ortiz testified the day he went to buy the property, he made a videotape of the area, and subsequently showed it to defendant. Ortiz indicated the reason he wanted to sell the property was that he had fallen behind in his payments, and had been sent a letter of foreclosure. Thus, he was hoping to "get rid" of the property before his "credit became completely ruined."

Ortiz further stated he had initially made plans to meet defendant at a little store just off Highway 101 in Paso Robles on Sunday, May 18, 1996. However, the weekend before the planned meeting, Ortiz had a rental car stolen, and could not arrange transportation to Paso Robles. Ortiz was unable to notify defendant of his inability to meet on May 18th because his work hours did not allow him to call.

Dr. Robert Downie, of the Kern Medical Center, was the emergency room attending physician when defendant was

brought in on the day of the incident. Downie observed defendant's treatment by a resident, Dr. Mottlei. Just prior to testifying, Downie physically examined defendant in a back room of the court. He observed two cuts on defendant's right hand, and two lacerations in his left armpit. On crossexamination, Downie indicated defendant's injuries were not life threatening. He also noted a specimen for evaluating drugs was not taken from defendant, although the chart reflected a urine sample was requested. Downie also said defendant's hand injury was consistent with a person having a knife in their hand and hitting a hard surface, causing the hand to slip down the blade.

Marc Taylor, a criminalist who operates a private forensic laboratory, testified the three blood samples taken from room 238 were "absolutely not" sufficient. In his opinion, a sampling should have been taken from each unique blood spatter pattern - perhaps 50 to 100 samplings. The samplings performed did not "allow an evaluation of what the actual events were and who was bleeding and what location." Taylor testified it was possible to take fingerprints off spent bullet casings, and the blood evidence was consistent with Gonzales' version of the events.

Dr. John Thornton, director of a forensic services consulting laboratory in Hayward, testified the photographic documentation of the scene did not allow for full crime scene reconstruction. The photographs were sufficient as "general photographs," but "not the photographs that anyone would desire if it is required to interpret the blood spatter." Thomton further testified more blood samples should have been taken, but did not believe more than 10 additional samples were necessary. Thornton characterized Taylor's estimate of 50-100 samples as "excessive." Thornton also indicated the physical evidence was consistent with the version of events as told by Gonzales.

Rebuttal

Gregory Laskowski, the supervising criminalist with the Kern County Regional Crime Lab in Bakersfield, testified regarding the .357 revolver used. According to Laskowski, the gun was a "double action revolver." In other words, it could be fired in two ways: by first pulling back the hammer, and then pulling the trigger; or, by simply pulling back the trigger only, then allowing the hammer to fall back and release on its own. According to Laskowski, to pull the trigger with the hammer already pulled back required three pounds of pressure, while pulling the trigger without first pulling back the hammer required ten pounds of pressure. It was Laskowski's opinion that it took a purposeful act to fire the gun.

Joseph Guiffre, a senior deputy with the Kern County Sheriff's Department, had testified before about different indicia of drug transactions, and had worked as an undercover officer. Guiffre was a member of the "special enforcement division major violator unit narcotics task force," and was also the asset forfeiture investigator for his unit. Based on how the money was packaged, the denominations of the money bundles, the use of codes on the majority of numbers found on the two pagers, the discovery of an "informer bug sweeper," the existence of cellular phones, guns, and ammunition, and the use of two vehicles, Guiffre testified it was his opinion the money found on defendant "was going to be or was involved in narcotics transactions."

DISCUSSION

I. Defendant's right to due process was not irreparably harmed based on what evidence was collected.

Defendant contends the investigating officers "failed to collect and preserve numerous items of evidence that were necessary to establish witness credibility, sort out competing claims of what actually took place, and would have exonerated [defendant], at least from first-degree murder

charges." As a result, defendant argues his right to due process was irreparably harmed. We disagree.

A. Applicable law

To avoid violating a criminal defendant's constitutional right to due process, law enforcement agencies have a duty to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488, fn. Omitted; See also *People v. Hines* (1997) 15 Ca1.4th 997, 1042.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta, supra,* at p. 489) The United States Supreme Court has additionally stated, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58.)

"However, *Trombetta* did not hold that the police have a duty to collect evidence potentially favorable to the accused in the first instance." (*People v. Bradley* (1984) 159 Ca1.App.3d 399, 407.) Nor did *Youngblood,* nor any California case of which we are aware so hold. "The police cannot be expected to `gather up everything which might eventually prove useful to the defense.'" (*People v. Hogan* (1982) 31 CaUd 815, 851[disapproved on other grounds in *People v. Cooper* (1991) 53 Ca1.3d 771].) ""'[T]he law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring ... evidence ... deemed necessary
to the defense of an accused." [Citation.]' [Citations.]" (*People v. Callen* (1987) 194 Ca1.App.3d 558, 561.)

Nonetheless, the California Supreme Court has recognized, "[t]here might be cases in which this court would

impose sanctions for a failure to obtain evidence." (*People v. Hogan*, supra, 31 Ca1.3d at p. 851.) Although we are aware of no case where a court has done so, the Supreme Court has suggested that a due process violation may occur where the police act in bad faith in failing to obtain evidence. (See, e.g., In re Michael L. (1985) 39 Ca1.3d 81.) Also, in *Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, the court:

> "[held] that a bad faith failure to collect potentially exculpatory evidence would violate the due process clause. As the Court in Youngblood observed, limiting the scope of the due process clause in this, context to a bad faith failure to collect such evidence `both limits the extent of the police's obligation . . . to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.'" (Id. at pp. 1120-1121.)

B. Discussion

At the outset, we note there is a threshold question of whether this is a "failure to preserve" or a "failure to collect" case. In a failure to preserve case, it is possible for defendant to show a violation of due process in the absence of bad faith. (See, e.g., *People v. Pastor Cruz* (1993) 16 Ca1.AppAth 322, 325 ["Even in the absence of bad faith, the failure of the prosecution to preserve evidence that 'might be expected to play a significant role in the suspect's defense' does violate due process."].) In a failure to collect case, however, in order for defendant to show a due process violation, some showing of bad faith is essential. (See *In re Michael L., supra*, 39 Ca1.3d 81; *Miller v. Vasquez, supra*, 868 F.2d 1116.) We find this is a "failure to collect" case.

The evidence defendant complains of here, the broken cellular phone, additional blood samples and spatter

photographs, and fingerprints from the bullet casings, were never booked into evidence. During pretrial motions, defense counsel argued that by taking control and exercising "complete dominion" over the crime scene, the police department conducted "a de facto gathering of evidence." As aptly put by the court, "[t[his isn't collecting though." We know of no court, and defendant fails to cite to any authority, which has found the mere cordoning off of a crime scene equates to an actual collection of all potential evidence inside its boundaries. We decline to do so here.

Citing testimony from Thornton, Taylor, Smith, and Ray, defendant takes great pains in an attempt to show the police could have collected more evidence. In reviewing the testimony, however, this does not appear to be at issue. Technical experts from both the prosecution and the defense all offered their opinions that they would have collected more evidence. Even Sergeant Glen Johnson, supervisor of the technical investigations unit, admitted a few more blood samples could have been taken.

However, because more samples could have been taken does not mean the police acted in bad faith, or that the investigation performed violated defendant's due process rights. If the standard were whether more evidence could have been collected, it is hard to imagine any case that would withstand such a challenge. As Johnson stated, "[t]here hasn't been a case I have been involved in I haven't looked back and thought we could have done different but that is human nature. You always look back and look at all the information and think back the things you could do better." The question here is not whether more evidence could have been collected, but whether the police acted in bad faith in failing to collect certain pieces of evidence. The answer is the police did not act in bad faith.

In an attempt to distinguish this case from *Hogan* and *Bradley*, defendant argues those two cases involved the

following predicate facts: 1) the police had no reason to believe the evidence would have exonerated the suspect; and 2) the law enforcement
personnel were well trained and diligent. Defendant further contends "[n]either of these circumstances was present in the case at bench. Indeed, it was just the opposite." We disagree.

Johnson, a sergeant for 15 years, testified he goes to the scene of approximately 95 percent of all homicides that occur in Kem County. Johnson indicated eyewitnesses play a factor in determining what evidence is collected. Here, they were able to talk to one of the eyewitnesses from inside the room, Munoz, prior to processing room 238. Johnson further indicated, based on the information they had at the time, he felt the number of samples taken from inside room 238 was sufficient.

Detective John Fidler, employed by the Kern County Sheriff's Department for 21 years, testified the technicians seized evidence and took photographs under his direction. Fidler indicated he likely discussed every evidentiary item with Christopherson and Johnson prior to deciding whether to seize it. There was extensive questioning by defense counsel concerning statements made by Gonzales and Munoz shortly after the incident. The questions focused on the differences between these statements and their testimony at trial. There was no testimony Fiddler's decisions on which items to seize were based on a bias against defendant or designed to favor the prosecution.

Christopherson, also employed by the Kern County Sheriff's Department for 21 years, testified he had worked "hundreds of homicide investigations" in addition to having over 1,000 hours of training. Christopherson also testified at length about what they learned at the crime scene, and why certain items of evidence were seized and others were not.

The three primary investigating officers possessed a wealth of training and experience. Similar to Hogan and

Bradley, defendant fails to show how the police failed to collect evidence that would have exonerated him. For example, the bullet casings would not have altered the uncontradicted evidence that defendant shot Silva and shot at Charles, while Gonzales hid in the office lobby. Finding defendant's blood on the cellular phone would, at most, prove defendant handled the phone with a bloody hand. It would not have shown when it was thrown, or why it was thrown. As Christopherson testified, "[there was blood on everything in the room." While defendant's blood on the phone would have been consistent with his version of events, it would have been equally consistent with the testimony of Freier. Freier testified that after seeing defendant return to room 238 subsequent to the shootings, he heard "bangs like you threw something or hit something or whatever."

Defendant further attempts to show bad faith through the failure of the police to test the uncollected bullet casings for fingerprints. Thornton, one of the defense experts, testified it was "not unusual" to obtain latent fingerprints from spent casings. However, he also noted casings "have something of a reputation for being difficult to recover latent fingerprints from ...." Defendant states Ray "testified that he could not take fingerprints from casings because it could not be done." However, upon review of the actual testimony, it is apparent that defendant misstates Ray's testimony.

On direct examination, Ray said he decided against attempting to take fingerprints from the casings because "I've processed hundreds of casings and never once got a single finger print." On cross-examination, Ray expanded his answer, explaining:

> "The term is conducive and the surface has to be hard semi clean surface. Casings obviously are small to start with so even if I were to place a fingerprint on it as if to hold it to load it, I would only get a fragment of the fingerprint.

> "In the best case scenario the fingerprint in and of itself would be hard to identify ... I've processed hundreds of them and never once got a fingerprint off of a casing. [¶] I looked at it and sometimes with the light just right you can see if there is anything on it. I was able to determine there didn't appear to be latent evidence on it so I packaged it at that time."

What Ray testified to was that, based on his prior experience with casings and his examination of the casings in this case, he decided against trying to obtain a latent fingerprint. Ray never testified fingerprints, in general, could not be obtained from casings. His testimony with respect to why fingerprints were not obtained from the casings is a far cry from "bad faith."

In sum, there was no testimony that any member of the investigating team had developed a bias against defendant, choosing to only collect certain pieces of evidence. Contrary to defendant's assertion in his brief, there was no evidence the police "had a
precipitously conceived notion of how they wanted to shape the case for prosecution ...."

As indicated by Christopherson, this was a heavy eyewitness case. Munoz and Gonzales each told consistent stories with respect to how the incident inside the room occurred. The witnesses to what happened outside room 238 were also consistent in
describing defendant's beating of Silva, the shots fired, and that defendant's actions were calm and calculated. Choosing to collect evidence based on the statements of eyewitnesses, the majority of which were consistent with each other and contrary only to
the version told by defendant, is not bad faith.

Therefore, we find defendant's due process rights were not violated by the investigation performed. Defendant has failed to show that evidence he claims should have been

collected was not collected because of the bad faith of the investigating officers.

II. ***The evidence was sufficient to establish first degree murder and attempted murder.***

Defendant contends the evidence was insufficient to establish that he attempted to,

or committed, first degree murder. We disagree.

> "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing - what may be characterized as `planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a `motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of `a pre-existing reflection' and `careful thought and weighing of considerations' rather than `mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a `preconceived design' to take his victim's life in a particular way for a `reason' which the jury can reasonably infer from facts of type (1) or (2)." (*People v. Anderson* (1968) 70 Ca1.2d 15, 26-27.)
>
> "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid

value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears `that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.] In *People v. Anderson, supra,* 70 Ca1.2d at pages 26-27, we identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, as later explained in *People v. Pride* (1992) 3 Ca1.4th 195, 247: `*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]' Thus, while premeditation and deliberation must result from `"careful thought and weighing of considerations" ' [citation], we continue to apply the principle that `[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly ...." [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.App. 297, 331-332.)

B. Discussion

In viewing the evidence in the light most favorable to the judgment, we find there was more than sufficient evidence to find defendant guilty of first degree murder and two counts of attempted murder.

1. The attempted murder counts

a. Charles

Defendant was found guilty of first degree attempted murder with regard to both Gonzales and Charles. We begin with Charles.

The element of motive to kill Charles is satisfied. The jury could easily infer from the evidence that defendant was attempting to kill Charles, who was an eyewitness to his killing of Silva. (See *People v. Perez* (1992) 2 Ca1.4th 1117, 1126-27; *People v. Bloom* (1989) 48 Cal.3d 1194,1210; *People v. Bloyd* (1987) 43 Ca1.3d 333, 348; *People v. Arcega* (1982) 32 CAM 504.)

Regarding the element of planning, there was testimony by Charles that defendant noticed him while defendant beat Silva, and defendant went into room 238 for approximately 15 seconds before leaving with a gun. Upon going out of room 238, defendant aimed the gun toward Charles and Silva, and fired. Defendant then continued to fire in the direction of Charles. As courts have recognized, pointing a loaded gun toward a potential victim supports an inference defendant "contemplated in advance the possibility he would have to shoot." (*People v. Brito* (1991) 232 Cal.App. 316, 323; see also *People v. Miranda* (1987) 44 Cal.3d 57, 87 ["the fact that defendant brought his loaded gun into the store and shortly thereafter used it ... reasonably suggests that defendant considered the possibility of murder in advance"]; accord *People v. Adcox* (1988) 47 Ca1.3d 207, 240 [evidence of prior planning found where the defendant took his loaded weapon to the unarmed victim's location].)

Additionally, in each of the cases cited above, the time between the killing of the initial victim and the killing of the eyewitness was very brief, involving no more than the time it took to move to the next victim and begin the deadly attack. Yet, in each case our Supreme Court held the evidence was sufficient, when considered in conjunction

with the motive, to uphold the guilty verdict.

The evidence also supports a finding that the manner in which defendant attempted to kill Charles demonstrated the existence of a preconceived plan. As in *Miranda,* the fact Charles was unarmed and did nothing to provoke defendant "leads to an inference that [the] attack was the result of a deliberate plan rather than a `rash explosion of violence.' " (*People v. Miranda, supra,* 44 Ca1.3d at p. 87.)

For all these reasons, we find the evidence was substantial, thereby permitting a rational trier of fact to find defendant attempted to murder Charles.

b. Gonzales

We next consider the evidence concerning the attempted murder of Gonzales. Munoz testified defendant, absent any provocation, began pacing the hotel room stating "this ... isn't happening," after which defendant attacked her. Gonzales subsequently entered, and was the sole eyewitness to defendant's attack on his own cousin's girlfriend, Munoz.

Viewing the evidence in the light most favorable to the judgment, the jury could have inferred defendant had a motive to attempt to kill Gonzales. Gonzales was the only eyewitness to defendant's attack on Munoz. As noted above, our Supreme Court has consistently recognized the elimination, or as here, the attempted elimination, of an eyewitness to a crime as sufficient motive for a finding of first degree murder.

There was also sufficient evidence of attempted murder based on the manner of defendant's attack on Gonzales, which supports the jury's finding. Based on the testimony of Munoz and Gonzales, it was undisputed Gonzales was unarmed when he entered room 238 and saw defendant attacking Munoz. Defendant was able to observe Gonzales as Munoz hid behind Gonzales for protection. There was testimony Gonzales did nothing to provoke defendant, instead, telling him to calm down, and asking what was

wrong. Defendant had time to consider his actions as he paced the room rubbing his head, entered the bathroom for a drink of milk, left the bathroom and then removed his knife from its sheath, swinging it at Gonzales. Additionally, once he had Gonzales down, defendant continually stabbed Gonzales until Gonzales's condition was life-threatening. This included one wound that was potentially mortal to Gonzales had it not deflected off a rib.

Defendant argues that merely because there is an alternative version of the events, either his version must be believed or it is enough to make the prosecution's case insufficient. Defendant is incorrect. Whether an alternative version of events was presented is simply not the standard of review on appeal. Also, it is a basic appellate principle that the credibility of witnesses "is the exclusive province of the trial judge or jury to determine ...." *(People v. Jones* (1990) 51 Ca1.3d 294, 314.)

Therefore, we also conclude there was sufficient evidence for the jury to find defendant guilty of the attempted murder of Gonzales.

2. The first degree murder count

The evidence supporting the jury's finding of guilt regarding the first degree murder of Silva is very similar to the evidence supporting the attempted murder charge against Charles.

The element of motive, again, is satisfied through the inference defendant wanted to eliminate any eyewitnesses to his crimes. In the case of Silva, the jury could easily have inferred defendant wanted to kill Silva to eliminate what was essentially the only eyewitness to his attack on Gonzales.[3]

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[3]While Munoz was initially in the room with both defendant and Gonzales, she testified she immediately left the room when she saw defendant take the initial swing at Gonzales. Thus, technically she was not an eyewitness to the actual

The element of planning is satisfied through defendant's use of the .357 handgun. Although the cause of Silva's death related to the stabbing, the jury could have reasoned that when defendant left room 238 with a loaded gun, he was prepared for the possibility that Silva was still alive, and planned to shoot Silva.

A finding of premeditation and deliberation is also supported by the manner in which the murder was committed. Just as with Charles and Gonzales, the fact Silva was unarmed and did not provoke defendant leads to an inference the attack was a result of a deliberate plan. (*People v. Miranda, supra,* 44 Cal. 3d at p. 87.) Even more significant was the testimony from Charles relating to defendant's beating and subsequent shooting of Silva.

Charles testified he observed defendant picking up Silva with one hand, while beating him to the ground with the other, and he observed this activity "four or five times," despite Silva's pleas. Then, after returning from room 238 with the loaded gun, defendant pointed the gun at Silva and Charles, and fired. These were not warning shots, or attempts to scare an eyewitness away from the scene. Although defendant testified to a different version of the facts, it is without dispute that a rational trier of fact could have used the testimony of Charles and others to infer that defendant "demonstrated a deliberate plan to kill [Silva]." (*People v. Davis* (1995) 10 Cal.4th 463, 510.)

Thus, in viewing the evidence in the light most favorable to the judgment, we find there was sufficient evidence to find defendant guilty of the first degree murder of Silva.

III. The prosecution was not barred by collateral estoppel from using drug indicia evidence.

Upon defendant's arrest following this incident, the

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altercation.

$15,020 found among his personal effects was confiscated by the Kern County Sheriff's Department. On July 19, 1996, defendant moved for return of the money on the ground there was no probable cause to believe it was forfeitable pursuant to Health and Safety Code section 11470, subdivisions (a) through (g), inclusive.

On August 2, 1996, the court granted defendant's motion, finding a lack of probable cause pursuant to stipulation of counsel. The court signed an order declaring the seized property not forfeitable under Health and Safety Code section 11470, subdivision (f), and mandated its return.

On September 10, 1996, defendant moved in limine to exclude proposed expert testimony that the money found was related to controlled substance transactions. Defendant based his motion on the ground "the issue of the money being possessed for a drug transaction had been adjudicated" in the forfeiture proceeding. The People opposed defendant's motion on the grounds the evidence established motive or state-of-mind, was thus relevant, and as relevant, had to be admitted. Alternatively, the People argued the issue was not fully litigated, and therefore not subject to collateral estoppel. After argument on the motion, the court ruled:

> "The Court makes a finding, and also having read the cases of Barker versus [Hull] and People versus Sims, that the doctrine of collateral estoppel does not apply here; that the issues of specific source for purpose of the seized currency has not actually been litigated; and there is no drug charge pending in this case; it's the homicide case; nor any claim made that the currency is subject to forfeiture. Therefore, the People are not precluded from introducing evidence regarding the source or purpose of the funds."

Subsequently, after defendant presented his case, including evidence regarding how he obtained the $15,020 and the intended use of the money, the prosecution offered

rebuttal testimony from Guiffre. Guiffre testified it was his opinion the money either had been or was going to be involved in a drug transaction.

Defendant now contends the trial court's ruling was in error, and the principles of collateral estoppel precluded the prosecution from attempting to relitigate the issue of whether defendant was engaged in a drug transaction. We disagree.

A. General principles of res judicata/ collateral estoppel

> "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. [Citations.] The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. [Citations.] The doctrine also serves to protect persons from being twice vexed for the same cause. [Citation.]" (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810-811.)

The doctrine has two features. In its primary form, referred to as claim preclusion, the prior judgment acts as a complete bar to a second action; it precludes parties or their privies from relitigating a claim or cause of action that has been finally determined by a court of competent jurisdiction. (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376.) The second feature, referred to as issue preclusion or collateral estoppel, "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.) " 'Any issue

necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.' [Citations.]" (*Azadigian v. Workers' Comp. Appeals Bd., supra,* 7 Cal.App.4th at p. 376.)

B. Discussion

Defendant argues the court erred in finding the issue had not been actually litigated during the forfeiture proceeding. Even if true, we still find the court did not err in allowing Guiffre's testimony.

"Under the California forfeiture scheme, the state is entitled to a judgment of forfeiture on cash amounts of less than $25,000 only if it can prove beyond a reasonable doubt that the cash consists of `[m]oneys ... furnished by any person in exchange for a controlled substance' or proceeds traceable to such an exchange ...' [Citations.]" (*People v. $9,632.50 United States Currency* (1998) 64 Cal.App.4th 163, 168.) Therefore, when the $15,020 was returned to defendant, the collateral estoppel effect of the prior judgment would only have precluded the prosecution from again attempting to prove beyond a reasonable doubt that the money was related to a controlled substance transaction.

For collateral estoppel purposes, we fast look to the purpose for which the evidence is being introduced in the second proceeding. We then look to the standard by which that purpose must be proven to determine if the prior proceeding has any collateral estoppel effect. Here, defendant was not charged with any drug-related crimes which had to be proven beyond a reasonable doubt. The purpose of Guiffre's testimony on rebuttal, as recognized by defendant, was for impeachment and to show motive. Therefore, the initial issue was whether Guiffre's testimony was relevant to those purposes.

A trial court is vested with wide discretion in determining relevance, but it has no discretion to admit

irrelevant evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681; *People v. Green* (1980) 27 Cal.3d 1, 19; Evid. Code, § 350[disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826].) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury. [Citation.] The weight of such evidence is for the jury. [Citation.]" (*People v. Slocum* (1975) 52 CaLApp.3d 867, 891.) The fact sought to be established does not have to be conclusively proven in order for the evidence to be relevant. (*People v. Yu* (1983) 143 Cal.App.3d 358, 376.)

Defendant claims that "under the facts presented here, testimony to the effect that the money was intended to buy drugs would not tend in reason to prove any disputed issue regarding motive." To the contrary, testimony that the money and other personal items of defendant were indicia of drug trafficking tends to prove defendant's paranoia as described by Munoz and Gonzales. It also provides a reason for defendant's attack of Munoz and Gonzales. The testimony would also help explain defendant's actions in using the bug sweeper upon entering the motel room. As stated in *People v. Scheer* (1998) 68 Ca1.App.4th 1009, 1017-18:

> "Motive is not a matter whose existence the People must prove or whose nonexistence the defense must establish. [Citation.] Nonetheless, '[p]roof of the presence of motive is material as

> evidence tending to refute or support the presumption of innocence.' [Citation.] A 'motive' is defined as a `[c]ause or reason that moves the will and induces the action[,]' `[a]n inducement, or that which leads or tempts the mind to indulge a criminal act.' [Citation.] Motive is an intermediate fact which may be probative of such ultimate issues as intent [citation], identity [citation], or commission of the criminal act itself [citation]."

Additionally, the testimony was directly on point for impeachment purposes. Although the prosecution offered no witnesses during its case-in-chief regarding the source/purpose of the money, defendant elected to open the door, despite knowing the prosecution would seek to rebut this evidence with expert testimony. For all these reasons, we find the testimony to be relevant.

Having reached this conclusion, the issue becomes whether the prior forfeiture proceeding had any collateral estoppel effect on the ability to introduce the expert drug testimony on rebuttal. It did not.

The most important factor is the differing standards of proof underlying the purposes for which the evidence was used. In the forfeiture proceeding, the People were required to prove beyond a reasonable doubt that the money was related to a drug transaction. Here, however, they merely needed to show the testimony was relevant. In other words, the standard for the admission of Guiffre's testimony was significantly lower than the beyond-a-reasonable-doubt standard of the forfeiture proceeding.

It is well established that collateral estoppel may not apply in a situation where the contested issue was litigated but not proven in a prior proceeding with a higher burden of proof. (See, e.g., *Guardianship of Simpson* (1998) 67 Cal.App.4th 914,933 ["an issue might be litigated in one case, but that would not stop it from being litigated in another if

the standard of proof in the first case were higher...."]; *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 563 [doctrine of collateral estoppel may not apply where two proceedings have differing burdens of proof]; *In re Nathanial P.* (1989) 211 Ca1.App.3d 660, 670 ["differing burdens of proof" barred "application of collateral estoppel"].)

A common example of this is where a defendant is acquitted in a criminal trial, yet still subject to civil action based on the same conduct. The prior acquittal does not have res judicata or collateral estoppel effect, even though the same issue(s) may have been
litigated and found not proved. This is because the subsequent civil case has a lower burden of proof. Failing to prove an issue beyond a reasonable doubt does not preclude a party from attempting to prove that same issue by a preponderance of the evidence.

Similarly, here, even if the government was unable to prove a connection between the $15,020 and controlled substances beyond a reasonable doubt, that does not preclude use of the testimony to show motive for impeachment purposes. As indicated earlier, the prosecution was not attempting to relitigate whether the money was connected to illegal drug transactions. The prosecution was merely introducing the testimony on rebuttal after defendant brought the source/purpose of the money into question.

Thus, we find the court did not err in allowing Guiffre's rebuttal testimony. The testimony was relevant for impeachment purposes. The prior forfeiture proceeding had no collateral estoppel effect on the introduction of the evidence.

*IV. **The defendant was not prejudiced by the prosecutor's actions toward defendant's witnesses.***

On August 27, 1996, defendant filed a motion for sanctions based on outrageous governmental misconduct. The alleged misconduct stemmed from the actions of either

the prosecutor or the police in contacting four people who had previously been identified as potential defense witnesses. Although none of the four witnesses indicated they would not testify as a result of the actions, defendant contends "attempts to intimidate should not be immune from judicial response." Defendant further alleges he was prejudiced by the prosecutor's actions and the trial court's failure to take any remedial measures (such as reading his suggested jury instruction), and this prejudice requires reversal.

A. Applicable law

Both parties agree the relevant case on this issue is the California Supreme Court case of *In re Martin* (1987) 44 Cal.3d 1. In *Martin,* the court set out the law regarding prosecutorial interference with defense witnesses as follows:

> "A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf. [Citations.] [¶] Governmental interference violative of a defendant's compulsory-process right includes, of course, the intimidation of defense witnesses by the prosecution. [Citations.]
>
> "The forms that such prosecutorial misconduct may take are many and varied. They include, for example, statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony. [Citations.] They also include statements to defense witnesses warning they would suffer untoward consequences in other cases if they were to testify on behalf of the defense. [Citations.] Finally, they include arresting a defense witness before he or other defense witnesses have given their testimony. [Citation.]

"In order to establish a violation of his constitutional compulsory process right, a defendant must demonstrate misconduct. To do so, he is not required to show that the governmental agent involved acted in bad faith or with improper motives. [Citations.] Rather, he need show only that the agent engaged in activity that was wholly unnecessary to the proper performance of his duties and of such a character as `to transform [a defense witness] from a willing witness to one who would refuse to testify ....' [Citations.]

"To establish a violation, the defendant must also demonstrate interference, i.e., a causal link between the misconduct and his inability to present witnesses on his own behalf. To do so, he is not required to prove that the conduct under challenge was the `direct or exclusive' cause. [Citations.] Rather, he need only show that the conduct was a substantial cause. [Citations.] The misconduct in question may be deemed a substantial cause when, for example, it carries significant coercive force [citation] and is soon followed by the witness's refusal to testify [citation].

"Finally, the defendant must also demonstrate `materiality.' To carry his burden under federal law, `he must at least make some plausible showing of how [the] testimony [of the witness] would have been both material and favorable to his defense.' [Citation.] Under California law he must show at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable. [Citations.] " *(In re Martin, supra,* 44 Ca1.3d at pp. 30-32.)

B. Discussion

There were four affidavits attached to defendant's motion for sanctions based on outrageous conduct, from defense

witnesses Cuevas, Keyser, Ortiz, and Alnes. Cuevas stated she was contacted by police, and informed there was a problem with the car purchase she had made from defendant. Cuevas also indicated she was asked to sign her name 10 times in an effort to verify her signature, and was told if she helped defendant she would be prosecuted for a crime. Keyser noted he had been contacted by the prosecutor and asked why he was on defendant's witness list. Keyser further indicated the prosecutor stated she should show Keyser pictures of what defendant did to Silva.

Ortiz's declaration included information that both the Hollister Police Department and the prosecutor had contacted him. Although Ortiz informed the prosecutor his only involvement was regarding the proposed property sale to defendant, he was told he would be in court three to four days, and the prosecutor recommended she show Ortiz the pictures of Silva. Lastly, Alnes indicated he informed the prosecutor he had been at defendant's residence while defendant was counting the $15,000 cash, and that both Munoz and Gonzales were also present. The prosecutor then continued the conversation as follows: 1) asking Alnes "a number of times" if he had smoked marijuana with defendant, or seen any drug activity by defendant; 2) asking Alnes if he knew what defendant had done; 3) telling Alnes defendant was a cold blooded killer, and if Alnes saw the pictures of Silva he would agree; and 4) asking Alnes if the defense attorney had coached him on what to say.

While we do not condone the actions of the prosecutor, generously termed "perhaps somewhat [zealous]" by the court, what remains absent is any evidence of a constitutional violation. It is clear from the court's statements in *Martin* that, for a remediable violation to have occurred, the defense must show a witness has not testified at all, or has failed to testify to the full extent of his or her knowledge as a result of governmental actions. That is not the case here.

Of the four witnesses defendant alleged had been intimidated, two (Ortiz and Cuevas) testified. Defendant fails to raise any issue regarding the testimony they provided, i.e., that their testimony was in some way limited as a result of their contact with the prosecutor and/or police. As for the other two witnesses (Alnes and Keyser), although they did not testify at trial, there were no allegations that they had been dissuaded from doing so as a result of their contact with the prosecutor. In fact, defense counsel informed the court "[t]he problem in this case is not so much that the attempt failed to cause him not to come to court, the attempt shook them up to the point that they were upset with the prosecution, with the offers to show photographs."

Nor are there any allegations in defendant's brief that the failure of Alnes or Keyser to testify was the result of their contact with the prosecutor. Defendant merely proffers what, in his opinion, was the result of their not testifying. Additionally, the jury instruction defense counsel requested as a sanction dealt solely with an attempt to dissuade a witness, not with actual interference.[4]

In the absence of any evidence that a witness failed to testify, or did not testify to the complete extent of their knowledge, as a result of interference by the prosecution, we find defendant's constitutional right to compulsory process was not violated. Defendant argues "attempts to intimidate should not be immune from judicial response." We note that an appellate court is not the proper forum, nor is reversal the appropriate remedy, for alleged objectionable prosecutorial actions that fail to rise to the level of a constitutional

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[4]Defense counsel requested he be entitled to fashion a jury instruction along the lines of "If you find that the government in this case attempted to dissuade the witness, you should hold that fact as an adverse fact to the prosecution in this case."

violation.

Even if we found the prosecutor's actions were a substantial cause in the defense witnesses not testifying, his claim would still fail on materiality grounds. As stated in *Martin*, defendant must show at least a reasonable possibility the witness or witnesses could have given material and favorable testimony. Here, the only thing defendant states resulted from the prosecutor's actions was the absence of testimony that the .22 handgun was purchased for Gonzales at a flea market by Alnes with knowledge the gun was stolen. There is no explanation of how this information would be either material or favorable, let alone both. At best, the testimony may have been relevant to call into question Gonzales' credibility, since he testified he bought the gun from defendant. However, Gonzales admitted he lied to police about his knowledge of any firearms, and he personally informed the police where they could find the .22. Thus, any information regarding how he acquired the gun would have been both cumulative and marginal in its usefulness.

Significantly, how Gonzales acquired the .22 has nothing to do with the crimes with which defendant was charged and eventually found guilty of, nor with what happened inside the hotel room. Defendant's claim of self-defense also had nothing to do with Gonzales' acquisition of the .22. Thus, we fail to see how this single piece of evidence would have been material.

Therefore, since none of the defense witnesses were hindered by their contacts with state agents, and since the absent testimony was not material, we find defendant was not prejudiced.

V. The prosecutor did not trivialize the gravity of the jury's task during closing argument.

During her closing argument, the prosecutor stated:

"You will get a jury instruction which says

premeditation can happen in a very short period of time. People decide to kill all the time and everything about the defendant's behavior is consistent with that. The defendant left Hollister, California on his drug run and he intended to kill anybody who got in his way.

"When he got up from trying to kill Andres Gonzales and went to the door, he intended to kill whoever was behind the door. Sometimes people don't have their victims picked out. Let me give you an example how fast we can premeditate things.

"I used to drink regular coffee and I really like it but it bothered me so I went to the decaf coffee and you buy little boxes. Sometimes I would get up in the morning knowing full well caffeine in coffee would cause me to feel not great. I would look at the two boxes. I know caffeine is going to make me feel bad. I have deliberated and decided and weighed the risk. I know how I am going to feel and I choose the coffee.

"Have you ever gone to Jack In The Box and looked at the menu and said, 'I would really like to get the hamburger?' However, you want to stay on your diet. So you think 'I will start tomorrow. I will have the cheeseburger.' It probably takes three seconds.

"What about when you come to a green light and it turns amber and you are real close to an intersection? Your life and maybe the lives of your family in the car depend on how you make a calculated decision in a short period of time. As you approach the intersection and it is yellow, you say to yourself, can I make it, does my car stop fast, I will stop or go and decide. The fact of the matter is the judge will tell you it is the time used to determine

premeditation and deliberation but it is a cold, calculated decision, one that the defendant clearly made."

Defendant contends these statements trivialized the decision the jury had to make with regard to premeditation and deliberation. He asserts it minimized the burden of proof, by "[equating] it to unpressured decisions that jurors themselves make every day" and "[inviting] the jury to make the decision in the same way they approach their daily life." We disagree.

Defendant relies primarily on *People v. Nguyen* (1995) 40 Cal.App.4th 28. We find that case distinguishable.

In *Nguyen,* during closing argument the prosecutor stated:

"'The standard is reasonable doubt. That is the standard in every single criminal case. And the jails and prisons are full, ladies and gentlemen. [¶] It's a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving. If you have reasonable doubt that you're going to get in a car accident, you don't change lanes.

"So it's a standard that you apply in your life. It's a very high standard. And read that instruction, too. I won't paraphrase it because it's a very difficult instruction, but it's not an unattainable standard. It's the standard in every single criminal case." *(Nguyen, supra,* 40 Ca1.App.4th at p. 35.)

In analyzing the prosecutor's statements, the Nguyen court first noted:

"'Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' (*People v.*

Strickland (1974) 11 Cal.3d 946, 955.) To establish prosecutorial misconduct, it is not necessary to show the prosecutor acted in bad faith, but it is necessary to show the right to a fair trial was prejudiced. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) If the defendant fails to object to the asserted misconduct and does not request an instruction or admonition to lessen any possible prejudice, then the asserted objection is thereby waived. (*People v. Ghent* (1987) 43 CAM 739, 762.)" (*Nguyen, supra,* 40 Ca1.App.4th at pp. 35-36.)

The court said although it strongly disapproved of arguments "suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry," since this was an error that was curable by the trial court, Nguyen's failure to object waived the issue on appeal. (*People v. Nguyen, supra,* 40 Ca1.App.4th at p. 36.)

Here, defendant argues that because he did immediately object after the prosecutor's statements, the court was required to provide an admonition, and the failure to do so requires reversal.[5] That is simply not the case.

First, *Nguyen* dealt with comments directly relating to the burden of proof. The prosecutor's comments here related to the elements of premeditation and deliberation. Thus, the disapproval of the comments by the court in Nguyen has little, if any applicability here. Second, and most importantly, the *Nguyen* court nonetheless found any error would have been harmless, even had there been no waiver by the defendant. Specifically, the court noted, "we conclude Nguyen was not prejudiced since the prosecutor did direct

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[5]The court responded to defendant's objection by stating: "We will be instructing the jury on the burden of proof and reading instruction 2.90."

the jury to read the reasonable doubt instruction and the jury was correctly instructed on the standard." *(People v. Nguyen, supra,* 40 Ca1.App.4th at pp. 36-37.)

A similar finding is appropriate here. Even if the prosecutor's argument was improper, defendant fails to cite any authority that comments made regarding elements of the crime lessen the prosecution's burden of proof and require reversal. Further, even in the absence of authority, any error was harmless.

Before giving her examples, the prosecutor informed the jury they would be getting a jury instruction which defined premeditation. She also told the jury after defendant's objection that not only would the judge be reading the instructions, but what the judge read would be "the law." The jury was provided CALJIC No. 2.90 on the burden of proof, as well as CALJIC No. 8.20 which defines "deliberate" and "premeditated." As indicated by the court in *Nguyen,* "[w]e must presume the jury followed the instruction[s] and that the error was thereby rendered harmless." (*People v. Nguyen, supra,* 40 Ca1.App.4th at p. 37, fn. omitted.) Contrary to defendant's assertion, the simple fact the jury returned a verdict of guilty does not, on its own, overcome this presumption.

Therefore, we find the prosecutor's comments during closing argument regarding premeditation and deliberation do not require reversal.

VI. The judgment was not tainted by jury misconduct.

Jury deliberations began on September 25, 1996. The following morning, defense counsel informed the court that a spectator, Angie Talavira, overheard a conversation between four jurors during a break following the prosecutor's closing argument. According to defense counsel, Talavira overheard: 1) one juror remark, "I bet the suit was bought or he bought it with the drug money, the suit with drug money."; 2) another juror say, "Let's get this over with";

and, 3) one other juror suggest it was taking too long. Talavira indicated the four jurors were all male, and she identified two of them - one an alternate, and the foreperson.

The court subsequently called in the foreperson, outside the presence of the other jurors, and asked if he had overheard anything related to the above comments, or had information reported to him. The foreperson denied overhearing any remarks, but did acknowledge comments had been made about breaks lasting longer and the jury coming in later. After the entire jury was brought in, the court then asked them as a whole if they overheard the alleged conversation. The jurors shook their heads in the negative.

Defense counsel then moved for a mistrial. Prior to ruling on the motion, the court called in the alternate juror for individual questioning. The juror admitted that comments about the length of the trial may have been made by comparing this case to prior cases the juror had sat on. However, the alternate denied hearing any comments concerning defendant's clothing. After defense counsel informed the court Talavira could not be at the court before mid-afternoon, the court ruled as follows:

> "We will certainly listen to her and you are always free to have things reconsidered or renewed or bring it up again but based on what I have heard, we immediately moved forward with asking the attorneys to come up with suggested questions and procedures and considering that, we then talked to the foreperson, talked to the panel, talked to (079201) and I see no evidence of impropriety. The motion is denied."

Defendant now argues it was error for the court to not allow Talavira to testify and be cross-examined. He contends the failure of the court to individually question each juror "violated [his] rights to a fair trial by an impartial jury, the

right to present a defense, and his right to due process of law."

A. Applicable law

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.] A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citation.]" (*People v. Nesler* (1997) 16 Ca1Ath 561, 578.)

"Certainly, when there is a claim of juror misconduct, the court must conduct 'an inquiry sufficient to determine the facts ... whenever the court is put on notice that good cause to discharge a juror may exist.' [Citation.] But failure to conduct a sufficient inquiry is ordinarily viewed as an abuse of discretion, rather than as constitutional error. [Citations.]" *(People v. Pinholster* (1992) 1 Cal.4th 865, 928.)

B. Discussion

Although unclear, defendant's argument appears to be that had Talavira been able to personally present what she overheard, this would have added credibility to the information previously relayed by defense counsel to the court. Further, this enhanced credibility would have convinced the court to hold individual hearings with each juror, or somehow change the jurors' answers when questioned regarding the alleged misconduct. Thus, the absence of these occurrences violated his constitutional rights.

We initially note defendant infers Talavira's credibility was in some manner questioned because she did not relay

the information to the court first-hand. The actions of the court belie this inference. After being informed by defense counsel of Talavira's allegations, the court individually questioned the two jury members specifically identified. It also questioned the jury as a whole, and questioned each jury member while the entire panel was present. This was done even after it was reported that Talavira said one of the individuals wore a "No Fear" T-shirt, although neither the court nor counsel recalled any jury member wearing such attire.

It is also unclear what difference Talavira's presence would have made from a materiality standpoint. There was no evidence that Talavira had any additional information regarding the alleged misconduct beyond what was presented to the court by defense counsel. The context of the statements she overheard were clearly presented, and the specific individuals she was able to identify were separately brought before the court for questioning.

Significantly, defense counsel was asked if he wanted to question the foreperson after the court completed its inquiry, yet declined, answering, "Not based on his answers, Your Honor." Defense counsel was asked if he wanted to ask any supplemental questions of the jury regarding the alleged misconduct, when they were questioned as a whole. However, he declined. Defense counsel was similarly given the chance to ask additional questions of the alternate juror individually brought in for questioning, but elected not to do so.

Defendant contends the trial court "owed to itself and to [defendant] the duty to make individual inquiry of each juror ...." Defendant appears to ignore the fact this was done, just prior to the verdict being read. Although each juror was not questioned *alone,*
each juror was questioned *individually* with pointed questions regarding the alleged misconduct. Additionally,

after each juror was questioned, the court again asked defense counsel if there was "any followup," and counsel said no. The court took every appropriate step to ensure there had been no jury misconduct. This is supported by the fact defense counsel felt no need to follow up with any questions of the jurors.

Therefore, the court did not abuse its discretion by failing to have Talavira testify upon her arrival, or by not holding an individual evidentiary hearing with each jury member. The court had all the relevant information concerning the alleged misconduct, and took the proper steps to determine whether any misconduct had occurred.

DISPOSITION

The judgment is affirmed.

s/WISEMAN, J.

WE CONCUR:
s/DIBIASO, Acting P.J.
s/LEVY

Appendix B

FILED
2003 AUG 18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARMANDO MUNOZ,
Petitioner,
v.
M. KNOWLES, WARDEN,
Respondent.

CV F 01 5705 SMS HC

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS
(Document #1)

ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT

Armando Vincent Munoz ("Petitioner") is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition"). Pursuant to Title 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge.

STATEMENT OF FACTS

On May 17, 1996, Petitioner, Andres Gonzales ("Gonzales"), and Erica Munoz ("Munoz") were living in Petitioner's two-bedroom apartment in Hollister. Gonzales, who had known Petitioner for approximately twelve years, had been staying with petitioner for a few weeks prior to

May 17, 1996. (3 RT 616.)[6] Munoz, who was dating and living with Petitioner's cousin Ralph, began staying with Petitioner only a couple of days prior to May 17, 1996, after she had an argument with Ralph. (4 RT 1384.)

On May 17, 1996, Gonzales, Petitioner and Munoz left Hollister for Los Angeles. Although he didn't know the purpose of the trip, Gonzales knew that the white Toyota belonged to Petitioner's aunt. (3 RT 672.) According to Gonzales, Petitioner and Munoz were driving a white Toyota and Gonzales followed in a blue van he recently purchased from Petitioner for $5,100.00. (3 RT 616.) Gonzales had made a down payment to Petitioner of $1,600.00 but had not yet made additional payments. (3 RT 619.) Later, Gonzales learned that they were to leave the white car in Los Angeles and travel back to Hollister in the van. (3 RT 622-623.)

Gonzales also had in his possession a box of .22 caliber ammunition he had purchased at K-Mart approximately 7 to 10 days earlier. (3 RT 623.) Gonzales stated that he had purchased a .22 caliber pistol from Petitioner, however, Petitioner carried the .22 in the white car and Gonzales carried Petitioner's .357 caliber pistol in the van. (3 RT 623, 624, 626, 639). Gonzales also knew Petitioner to carry a knife which he had on his person that day. (3 RT 621.)

On the drive to L.A., Petitioner, Munoz and Gonzales stopped in Los Banos, purchased some food and went to someone's house to eat. Gonzales had seen the man at the house in Los Banos before but the man was not a friend. Gonzales and Ericka never spoke to the man. Gonzales could

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[6]"RT" refers to the Reporter's Transcript on Appeal; "AOB" refers to the Petitioner's Opening Brief on Due to sonic contusion in the preparation of the Reporter's transcript, the citation to the Reporter's pt will be to the volume number, followed by "RT" and then the page number, e.g. 2 RT 35.

not remember if petitioner spoke with him or not but they stayed at the house just long enough to eat. (4 RT 1207-1208.) The two vehicles then proceeded south on Interstate 5, stopped at a rest stop and decided to get a room in Buttonwillow. (3 RT 626; 4 RT 1389.) It was approximately 10:30- 10:45 p.m. when Petitioner paid for two rooms at the Motel Six in Buttonwillow. (3 RT 626-627.) Petitioner informed Gonzales that Ericka would be staying in Petitioner's room. (3 RT 629.)

When Petitioner entered the room, he took a item, held it out away from his body and waved it around in both rooms. (3 RT 633.) Gonzales did not know, however, what the item was or what it was used for. Id.

After checking in, Gonzales went to a nearby store for "sodas, milk and stuff," and when he returned, the three of them smoked two marijuana cigarettes and watched TV. (3 RT 632, 534.) Gonzales admitted he had used cocaine two days earlier. (3 RT 631, 661.) Some time between 11:30 p.m. and midnight, Gonzales got tired and went to adjoining room 237 to sleep. (3 RT 634-635.) Gonzales placed the loaded .22 caliber underneath blankets on the bed in room 237. (3 RT 638-639.) Gonzales had given the .357 to Petitioner shortly after checking in. (3 RT 639). The adjoining door to room 238 remained locked at this time. (3 RT 636.)

After falling asleep, Gonzales was awakened by loud, banging noises coming from room 238. (3 RT 637.) Although he tried to go back to sleep, he heard a knock at the adjoining door and Ericka say "Mando," which was the name she called Petitioner. (3 RT 640.) When Gonzales opened the door, he saw Petitioner on top of Ericka on the bed "holding her around the neck and he had his arm up like he was going to get ready to hit her." (3 RT 640.) Gonzales later clarified that Petitioner was not holding her by the neck but holding her clothes and tightening them around her neck. (3 RT 699.)

Gonzales then asked what was going on when Petitioner

got off Ericka. (3 RT 641.) Ericka appeared frightened and walked over to Gonzales to stand behind him. (3 RT 641-642.) Gonzales told Petitioner to calm down. (3 RT 642.) Petitioner paced the room, rubbing his head. Petitioner then walked into the bathroom, drank some milk and came back out pulling out his knife and saying "this isn't happening." (3 RT 642-643.) Gonzales grabbed for the knife with his left hand, cutting three fingers and told Petitioner, "No." Petitioner pulled the knife away and stabbed Gonzales in the left shoulder. Petitioner and Gonzales continued to struggle falling to the floor between the two beds. (3 RT 644-646.) While Gonzales lay on his back, Petitioner continued to stab him in the wrist, back, chest, stomach and right knee. (3 RT 649-650.) Gonzales identified People's Exhibit 9-A as the knife that Petitioner used to stab him. (3 RT 643.)

Gonzales continued to scream for help as loudly as he when, at some point, Petitioner got up off him and went to the door leading to the second story landing. (3 RT 649-650.) Gonzales later told Police that he heard a knock at the door while he was on the floor between the beds. (6 T 1800-1801.) Gonzales saw that Petitioner had opened the door and had hold of someone else just outside the doorway, punching and pushing the other person backwards. (3 RT 651.) At this time, Gonzales got up and fled through the adjoining door to room 237 leaving that room and heading for the front office. (3 RT 651.) When Gonzales looked back, he saw Petitioner repeatedly stabbing and hitting the other man in front of room 238. Although Gonzales could not see the other man's face, he could see that he was down on one knee trying to defend himself, (3 RT 652-653.) Gonzales never saw the other man being attacked by Petitioner or take any aggressive action toward him. (3 RT 654.) Gonzales ran to the motel office for help and once inside, heard gunshots. (3 RT 656.) Gonzales lapsed in and out of consciousness while in the motel but remembered people trying to hide him. (3 RT

656.)

Ericka Munoz assumed she would stay in one room at the motel, and Gonzales and Petitioner would have the other room. (4 RT 1390.) Ericka stated that the three of them started watching TV in one of the adjoining rooms when Gonzales went to buy some refreshments. (4 RT 1393.) Gonzales and Petitioner smoked marijuana, but she did not. (4 RT 1395.) She testified that they watched a movie called "Murder in the First" when at one point, Petitioner turned off the TV and Gonzales went into the adjoining room. (4 RT 1396-97; 5 RT 1517.) She indicated-that Petitioner was pacing back and forth and "got upset. He got very mad and I don't know why." She and Petitioner had been watching TV and laughing and then "his expression just changed, he was mad, he didn't say why, I didn't know why, he was just mad." As Petitioner paced back and forth, he told her that she was "messed up" or "fucked up." (4 RT 1398-99; 5 RT 1517.)

Ericka asked petitioner if she had done anything wrong to make him mad and asked him what she had done when he respondent, "you know what." Petitioner then removed his knife from the sheath on his hip and walked toward her. (4 RT 1400.) Petitioner then put the knife back in the sheath, said he was sorry and walked toward her telling her he wanted to give her a hug. (4 RT 4 RT 1400-1401.) When she moved toward him to hug him, he said "that's fucked up" and again pulled out the knife." (4 RT 1401-1402.)

Petitioner then grabbed Ericka by the hair and threw her on the bed farthest from the door. (4 RT 1402.) Ericka was on her back with her knees up to her chest. (4 RT 1403.) Petitioner had his knee on her holding her by the hair while Ericka repeatedly asked what was ,wrong but Petitioner would not answer. (4 RT 1404.) At that point, Gonzales entered the room through the adjoining door, asked Petitioner was he was doing. (4 RT 1404-1405.) Ericka testified that Petitioner got up off her and appeared to calm

down but then began pacing again. (4 RT 1407-1409.) At this point, Ericka saw Petitioner swing his hand with the knife at Gonzales. (4 RT 1409.) She ran out of the room past a man wearing glasses and shorts, later identified as Terry Silva (hereinafter "Silva"). Ericka ran to the motel office to get help. (4 RT 1411). While in the office, she witnessed Gonzales enter full of blood. (4 RT 1414-1415.)

Nathan Charles (hereinafter "Charles") was traveling with his boss, Jay Lawson, a coworker "Billy," and two Doberman dogs, when they obtained a room at the Motel Six in Buttonwillow on the night of the crime. (2 RT 414.) The three checked into room 258 in the evening of May 17, 1996. (2 RT 416.).

Charles testified that during the early morning hours Charles heard a man yelling. (2 RT 420.) He poked his head out of his room and saw a man he identified in court as Petitioner, "viciously" beating Silva on the catwalk outside of rooms 237 and 238. (2 RT 419, 446.) Silva was on his back on the ground while Petitioner repeatedly picked him up with his left and struck him with his right. (2 RT 421, 443.) Charles saw Silva put his hands up in an attempt to cover his face but not fighting back and at the same time saying "I'm not going to die; You're not going to kill me," a few times. (2 RT 421.)

At this time, Charles yelled "hey, hey" at Petitioner in an effort to get him to stop. Petitioner looked up at Charles with an angry expression and ran back into his room. (2 RT 422) Charles then approached Silva who lay covered in blood on the catwalk. (2 RT 442.) Silva asked Charles five or six times to "get my brother in 147." (2 RT 424.) The dogs were standing nearby when Petitioner came out of the room with a gun, looked directly at Charles, pointed the gun in his and Silva's direction and fired. (2 RT 423, 426.) The first shot appeared to go into Silva's chest. Blood spurted from the wound and got onto Charles' hand. (2 RT 429, 461.) Before Charles could get up to run, he heard two additional shots,

one of which he felt go past his leg. (2 RT 429.) Charles was stunned by the gunfire and ran as quickly as he could to his room when he heard an additional three shorts fired. (2 RT 429.)

Once in his room, Charles looked through his motel room window and watched Petitioner go back into the room and then depart down the stairs, pausing briefing to look up into the sky. (2 RT 432-433.) When Petitioner reached a white car in the parking lot, he clasped his hands and laid on the sidewalk for three or four seconds as if to "grab his thoughts, it looked like." (2 RT 434.) Petitioner then got into the white car to drive off. Charles heard Petitioner drive away and heard a crash within five seconds. (2 RT 435, 465.)

James Riling, an auto mechanic, his girlfriend and son, were staying in room 140 of the Motel 6 on the evening of the murder. (2 RT 507, 509.) Riling was awakened by his girlfriend at approximately 2:00 a.m. and could hear a man screaming and yelling outside. (2 RT 520, 523.) Riling walked outside and saw a man was standing outside rooms 237 and 238 who appeared to be in a rage. (2 RT 523.) Riling returned to his room to put his shoes on when he heard five or six shots in rapid succession. He could see the flash of the gun barrel illuminated through his room curtains but could not tell who was firing. (2 RT 513, 526.)

When he got his shoes on and returned outside, he saw the same man who had been yelling, carrying a bag and walking calmly across the balcony and down the stairs. (2 RT 514515.) He then saw another man on the catwalk hanging onto the railing and screaming for help. (2 RT 517.) Riling then rushed upstairs to Silva and saw that he was severely wounded. (2 RT 517-518.) Riling then went into room 238 to see if anyone else was injured and saw a handgun on the floor in the bathroom of room 238 but did not touch it. (2 RT 519.) He also saw blood on the walls of the room. (2 RT 520.) Riling later noticed a knife in the grass below room 238. (2 RT

521.)

Richard Freier (hereinafter "Freier"), was also staying at the Motel Six in Buttonwillow on the night of May 17, 1996. Freier was in room 138. (2 RT 367.) After going to sleep at about 1:00 a.m., Freier was later awakened by a male voice saying "I'm sorry. I'm sorry." The voice was coming from the center of the motel and because Freier was offended by the profanity being shouted, he decided to get up and go outside. (2 RT 367.) When Freier looked out his window and noticed the door to room 238 was open, he saw a large man with dark hair, wearing a red shirt, and black pants leave the room with a gun in his hand. (2 RT 355.) Freier noticed a hand raise up from a person lying on the ground on the catwalk above, and then noticed the man with the gun turn fire the gun in a downward direction. (2 RT 356.) The gunman then returned to the room and Freier heard two more bangs that sounded different from the gunshots. When the man emerged from the room, he no longer had the gun but stood there shaking his right hand and looking around. (2 RT 357-358.) The man then stated "we need to get out of here," walked back into room 238 and left the room with a big bag. (2 RT 359.)

The man stepped over the person on the ground, went down the stairs and head to the parking lot. Freier said he then heard a car start up, tires squeal and then a car "crunch" into something. (2 RT 360.)

Freier went back to his room to check on his wife and then went back outside. He could see a "heavy blood trail" going to the motel main office from the upstairs area. The paramedics arrived and Freier witnessed two or three people attending to the downed person on the second story landing. (2 RT 361-362.) Freier later saw the bloody knife in the "grassy are next to the pool" underneath room 238. (2 RT 379-380.)

Gary Silva was a sales and auto leasing consultant in

northern California and was the twin brother of Terry Silva. Unlike his brother Terry, who had a medium build, Gary was physically much bigger than Terry. (2 RT 395-397.) Terry Silva was a sales representative for Wonder bread. (2 RT 397.) Terry was an insomniac who was often awake at night because of his work hours and because he had a habit of sleeping in the afternoon. Terry liked to take long walks in the evening. (2 RT 398-399.)

On the weekend that Terry was killed, Terry, Gary and friend, Warren Gwin, traveled to Nogales, Mexico to deliver a load of food and clothes to poor people. (2 RT 400.)

Gary Silva testified that they stopped at the Motel Six in Buttonwillow at about 10:00 p.m. on the night of the crime. Gary got a room by himself because he snored, and Terry and Warren shared the other room, room 137. (2 RT 401-403.) Gary and Terry called their wives after checking in and Gary then asked Terry to go for a walk. Warren, had already gone to bed. (2 RT 404-405.)

Gary and Terry walked around the entire motel complex for approximately thirty (30) minutes and then stopped near their truck to talk for another half hour. (2 RT 405.) Terry was wearing a blue short sleeve shirt, blue shorts and white tennis shoes. (2 RT 406.) After they finished talking, Gary went to his room and saw Terry go to his. (2 RT 406.)

Gary watched TV briefly and then went to sleep. He stated he never heard anything during the night but woke up just before 5:00 a.m. and "felt like something was wrong." (2 RT 407, 409.) He then heard a knock at the door and was informed that his brother had been killed. (2 RT 408.)

Warren Gwin, Terry's best friend of thirty (30) years, testified that Terry wore thick glasses and could not see without them. (3 RT 704.) Gwin also stated that Terry would take long walks at night due to his insomnia and that neither of the brothers drank alcohol. (3 RT 707.) Gwin too was sleeping until he was informed the next morning of Terry's

death. (3 RT 710.)

Approximately 3 to 4 miles from the Motel Six, Officer Hartman flying in a helicopter spotted the suspect vehicle about 25 yards off the road. From above, the officer could see a man laying on the hood of the car, arms outstretched, and naked. When Officer Hartman shined the spotlight on the man, the man got off the car, walked about 50 or 75 yards away, held his arms out and stood in place for a bit, then laid down. Officer Hartman directed ground officers to the scene and hovered above until the suspect was taken into custody. (4 RT 1239-1248.)

Deputy Sheriff Heriberto Flores arrived at the location where the vehicle was and witnessed petitioner lying naked on the ground with his hands on his stomach. He approached Petitioner and asked him to roll over so that he could be handcuffed, When he reached for Petitioner's hand, Petitioner yelled "Don't fucking touch me." (4 RT 1268.) Because of petitioner's size, he sprayed him with pepper spray and then handcuffed him. Deputy Flores indicated that petitioner's hands were covered in blood and there was a small cut on his arm but he was not bleeding profusely. (4 RT 1258-1263.) Flores saw a cut across the palm of his hand, and some blood inside the Toyota Petitioner had been driving. (4 RT 1269, 1273.) The vehicle appeared to have been wrecked and had a tire missing. (4 RT 1276.)

Dr. George Mowry treated Andres Gonzales for his stab wounds. (4 RT 1340.) Dr. Mowry estimated that when he treated Gonzales in the emergency room, Gonzales had lost at least three pints of blood and was continuing to bleed. (4 RT 1342.) Dr. Mowry felt Gonzales' wounds were life-threatening and that the wounds on his hands were consistent with his grabbing a knife blade and holding on. (4 RT 1351, 1356.) A drug screen ordered by Dr. Mowry also revealed that Gonzales had cocaine and marijuana in his

system.[7] (4 RT 1363, 1372.)

Dr. Robert Downie testified that Petitioner's right hand injury was at the base of his palm and was consistent with someone holding a knife and striking something hard such that his hand slipped down over the knife blade. (4 RT 1431-1434.) Dr. Downie further testified that the wound was also consistent with a defensive wound. (4 RT 1436.) Petitioner's medical records indicated that a urine sample for a drug screen was ordered, however, could not be obtained because medical workers "probably couldn't get a sample from the defendant. . ." (4 RT 1435.)

Armond Dollinger, a pathologist, testified that Terry Silva's cause of death was internal bleeding caused by two or three stab wounds to the lungs and subclavian vessels (under the collar bone). (5 RT 1574, 1639.) The subclavian vessel damage was the primary cause of death. (5 RT 1640.) The remaining stab wounds and gun shots contributed to his death. (5 RT 1574.) Dr. Dollinger also stated that two of the stab wounds penetrated the victim's skull and one stab wound entered the covering of the brain. (5 RT 1612-1613.)

DEFENSE CASE

Marc Taylor, a private criminalist, examined blood samples collected by sheriff's experts and indicated that he would have expected 100 or more blood samples from room 238. (5 RT 1718.)[8] Taylor contended that his conclusions were consistent with the prosecution's laboratory results and that his opinions were based only on the defense's view of the events and physical evidence provided. (5 RT 1719, 1727.) On cross-examination Taylor admitted that he could not tell who

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[7]Gonzales admitted to having used cocaine two days prior to the murder. (3 RT 631, 661.)

[8]Mr. Taylor modified his statement to "50 to a hundred samples . . ." on cross-examination. (5 RT 1744.)

the aggressor was in the struggle between Petitioner and Gonzales, or Petitioner and Silva. (5 RT 1745-1746.)

Ricardo Ortiz testified that he owned a 2.5 acre parcel in San Luis Obispo County and that he had shown Petitioner a videotape of the property and had plans to show Petitioner the land on the weekend of May 18, 1996. Ortiz said he needed to sell the land for approximately $15,000 to $18,000. He and Petitioner had discussed trading a van for the land. Ortiz was not going to meet Petitioner at the land on the weekend of May 19, 1996, because his rental car had been stolen. He never called petitioner to cancel because of conflicts and because Petitioner was difficult to get hold of. (6 RT 1767-1770, 1774.) Ortiz indicated that he did not know that Petitioner was going to bring cash to pay for the land. (6 RT 1774.)

John Thornton, a forensic scientist, criticized the manner in which the photos of blood spatter evidence were taken. (6 RT 1851-1852.) He testified that he would have taken more blood samples from the room but not more than 10 and that Taylor's assessment that 50 - 100 more samples were necessary was excessive. (6 RT 1851-1852.)

Thornton believed the documentation of the blood evidence was sloppy and could not tell from the spatter evidence who was the aggressor in the altercation. (6 RT 1861, 1865, 1888, , 1889.) Thornton conceded on cross-examination that he had not reviewed Andres Gonzales' medical report but agreed that Andres Gonzales' explanation of what happened in the room was not inconsistent with the physical evidence. (6 RT 1882.)

Petitioner testified that he never informed Gonzales or Ericka Munoz that they were going to Los Angeles, but that Gonzales brew they were actually going to Paso Robles. Petitioner stated that he never carried a gun or ammunition on the trip and did not know if Gonzales was carrying a gun. (8 RT 1728-1729.) Petitioner also testified that he did carry a

knife. (8 RT 1651; 8 RT 1726.)

Petitioner further testified that he never contacted the property seller, Ortiz, before the trip to confirm the meeting. (8 RT 1652.)

Petitioner stated that he paid for the hotel rooms because he had the money and that when they entered the rooms, he and Gonzales smoked a "joint." Gonzales then went for some drinks and was gone for about 15 to 20 minutes. (8 RT 1655.) When Gonzales returned, Gonzales and Ericka sat on one bed watching TV and he lay on the other bed. (8 RT 1659.) Petitioner stated that he fell asleep on the bed when Gonzales woke him up to ask if he could smoke another joint. Petitioner gave him permission and then tried to go back to sleep but Gonzales and Ericka were making too much noise. (8 RT 1660.) Finally, Petitioner turned off the TV and told them to go into the other room. Petitioner then went back to sleep and was awakened by Gonzales who was standing in the room rummaging through his backpack. Ericka was standing in the doorway between the adjoining rooms. (8 RT 1661.)

Petitioner got up and asked Gonzales what he was doing when Gonzales respondent "You know what I'm doing." (8 RT 1661-1663.) The knife lay on the counter near the backpack where Petitioner had placed it earlier. At this point, Petitioner states that Gonzales grabbed the knife and swung it at him cutting Petitioner's hand. Petitioner then kicked Gonzales and backed up. He grabbed his cell phone and threw it at Gonzales. (8 RT 1663-1665.) Gonzales then came at Petitioner with the knife, they started fighting and Gonzales stabbed Petitioner once under the arm. Petitioner took the knife away from Gonzales and stabbed him five or six times. (8 RT 1667-1668.)

Petitioner said he was scared for his life when a man then came into the room. Petitioner thought the man was Gonzales and jumped up and tried to tackle the man.

Petitioner then stabbed the man "like two times in the back of the leg" and could not remember stabbing him anywhere else. Petitioner indicated that he remembered hitting the man with both hands and when asked whether he had the knife in his hand at this time, he said "I guess so." (8 RT 16691670.)

Petitioner testified that the man never spoke to him but just kept hitting him and that he had lumps on the back of his head where he had been hit. Petitioner also testified that it was he who exclaimed "I'm sorry, I don't want to die." (8 RT 1671.) Petitioner and Silva struggled on the landing when the knife flew out of his hand. Petitioner stated that Silva pulled Petitioner's sweat shirt off during the struggle. When asked if he had hit Silva in the face, he responded "I guess so." (8 RT 1673.)

Petitioner indicated that he obtained the "informer bug sweeper" because he was interested in "electronic things" and could use the bug sweeper at work. (8 RT 1691.) He stated that the advertisement in the catalog said it was ideal for "detecting body wires." (8 RT 1692.)

Petitioner testified that he did not seek help for Silva because he was afraid for his life because he knew Gonzales had a gun and might return to the room. (8 RT 1696-1698, 1759.) Petitioner stated that he "accidentally" killed Silva while fighting for his life. (8 RT 1700.) After he fled from the motel, he "blacked out," and his car crashed in a field. (8 RT 1703.) Petitioner testified that he had not worked in all of 1996 but had made money selling cars and had borrowed money from his aunt, Bonnie Leon. (8 RT 1701, 1710.) The $15,000 cash found his backpack he obtained from Sylvia Cuevas who had recently bought a car from him. (8 RT 1713.)

Petitioner testified that Ericka Munoz was promiscuous and that he allowed her to stay with him but did not trust her alone in his house. However, neither Ericka or Gonzales had ever, stolen anything from him. (8 RT 1714-1715, 1726.)

Petitioner stated that he believed all the blood in the

room was his except for the blood in between the beds. (8 RT 1738-1739.) Petitioner also conceded that Silva did not have a weapon. When informed that Nathan Charles heard Silva say "you're not going to kill me" Petitioner responded that Charles was "probably" a liar. (8 RT 1746.) Petitioner also said that he fired the gun towards Charles because he was "trying to clear a path so I could leave." However, the first shot was fired accidentally because Charles startled him and his hands were shaking. (8 RT 1760, 1763.) Petitioner said that he shot the gun three times so Charles would run and "maybe go call the cops or something." (8 RT 1763.) Finally, Petitioner stated that he never intended to shoot Silva but that the last two shots fired into Silva were accidents because the gun "just went off." (8 RT 1765.)

REBUTTAL

Deputy Joseph Guiflre, senior deputy, had extensive experience in drug trafficking and testified that the manner in which the money was bundled and packaged, the cell phone, coded phone numbers on the cell phone, pager, bugging device, and use of two vehicles suggested that the money had been intended for a drug transaction. (8 RT 1822-23, 1826, 1831, 1832-1833, 1823, 1835.) On cross-examination, Guiffre stated that the money was not seized in a forfeiture proceeding but could have been if the D.A. would have proceeded with the forfeiture case. (8 RT 1837.)

PROCEDURAL HISTORY

On June 12, 1996, the Kern County District Attorney filed an information charging Petitioner in count one with murder (§ 187, subd. (a)), in the death of Terry Silva and further alleging that it was a serious felony within the meaning of section 1192.7, subdivision (c)(1). It was further alleged that Petitioner personally used a deadly weapon, a knife, in the commission of count one in violation of section 12022, subdivision (b)(1). It was further alleged inconnection with

count one that Petitioner personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). (CT 186-187.)[9] .

Count two charged Petitioner with the attempted murder of Andres Gonzales (§§ 664/187). It was further alleged in connection with count two that Petitioner personally used a deadly weapon in violation of section 12022, subdivision (b)(1) and that he inflicted great bodily injury within the meaning of section 12022.7, causing count two to be a serious felony within the meaning of section 1192.7, subdivision (c)(9). (CT 187.)

Count three charged Petitioner with the attempted murder of Nathan Charles (§ § 564/187) and further alleged that count three was a serious felony within the meaning of section 1192.7, subdivision (c)(9). It was further alleged that Petitioner personally used a firearm in the commission of count three in violation of section 12022.5, subdivision (a)(1). (CT 188.) An amended information was filed on August 21, 1996, adding counts four and five which charged assault with a deadly weapon and related enhancements in the assaults on Andres Gonzales and Nathan Charles (§ 245, subd. (a)(1)). (CT 567.)

On September 26, 1996, the jury found Petitioner guilty on all counts and found all :nhancements to be true. (Exh. 1, Answer, CT 711-712.)

On November 7, 1996, probation was denied and Petitioner was sentenced to 25 years to life on count one, the first degree murder of Terry Silva. Id. On counts two and three, he was given a life sentence with the possibility of parole with count two to be served consecutive to count one and count three to be served consecutive to count two. Id.

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[9]The Clerk's Transcript was not provided to the Court by Respondent However, it is not necessary for the resolution of the case.

Imposition of sentence for counts four and five was stayed pending completion of the terms for counts one, two and three. Petitioner was also given a total of eighteen additional years for the enhancements on counts one, two and three. The enhancements on counts four and five were stayed pursuant to section 654. (CT 1030-1031, 1033.)

A Notice of appeal was filed on December 3, 1996. (CT 1034.) On February 7, 2000, in an unpublished opinion, the Fifth District Court of Appeal affirmed the judgment in all respects, (Respondent's Ex. 4.)

On March 20, 2000, Petitioner filed a Petition for Review with the California Supreme Court. The Petition for Review was denied on June 2, 2000. (Respondent's Ex. 5)

On October 3, 2000, Petitioner filed a habeas petition in the Fifth District Court of Appeal which was denied on October 12, 2000.

On December 28, 2000, Petitioner filed a state habeas petition in Kern County Superior Court. The petition was denied on January 29, 2001.

On March 5, 2001, Petitioner filed a second habeas petition in the Fifth District Court of Appeal. This petition was denied on March 16, 2001.

Petitioner filed a third habeas petition in the Fifth District Court of Appeal. This petition which was denied on April 12, 2001. (Respondent's Ex. 6.)

On May 23, 2001, Petitioner filed a petition for writ of habeas corpus in the United States District Court, Eastern District. This Court, by order dated October 2, 2001, ordered respondent to respond.

On December 27, 2001, an Answer was filed by Respondent. Petitioner filed his Traverse on January 14, 2002.

DISCUSSION

A. Jurisdiction

Relief by way of a Petition for Writ of Habeas corpus extends to a person in custody ' pursuant to the

judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 120 S.Ct. 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. In addition, the conviction challenged arises out of the Kern County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 2241(d). Accordingly, the Court has jurisdiction over the action.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), cent. denied, 522 U.S. 1008, 118 S.Ct. 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), cert. denied, 520 U.S. 1107, 117 S.Ct. 1114 (1997), overruled on other grounds by Lindh v. Murphy, 521 U.S. 320,117 S.Ct. 2059 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant Petition was filed on May 23, 2001, and is therefore governed by the provisions of the AEDPA.

B. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The AEDPA altered the standard of review that a federal habeas court must apply with respect to a state prisoner's claim that was adjudicated on the merits in state court. Williams v. Taylor, 120 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will not be granted unless the adjudication of the claim "resulted in a decision

that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by he Supreme Court of the United States;" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d); Lockyer v. Andrade, 123 S.Ct. 1166, 1172 (2003) (disapproving of the Ninth Circuit's approach in Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000)); Williams v. Taylor, 120 S.Ct. 1495, 1523 (2000). "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Lockyer, at 1172 (citations omitted). "Rather, that application must be objectively unreasonable." Id. (citations omitted).

While habeas corpus relief is an important instrument to assure that individuals are constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983); Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal conviction is the primary method for a petitioner to challenge that conviction. Brecht v. Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court's factual determinations must be presumed correct, and the federal court must accept all factual findings made by the state court unless the petitioner can rebut "the presumption of correctness by clear and convincing evidence." 28. U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995); Thompson v. Keohane, 516 U.S. 99,116 S.Ct. 457 (1995); Langford v. Day, 110 Fad 1380, 1388 (9th Cir. 1997).

C. Claims for Relief

1. Failure To Collect Exculpatory Evidence

Petitioner argues that his right to due process was violated by police officers failure to collect evidence they had reason to believe might exculpate Petitioner. Petitioner

argues that due process "requires law enforcement agencies to preserve evidence that might be expected to play a significant role in the suspect's defense." (Petition, Ground 1.)[10]

The state's failure to preserve or collect evidence that is only potentially useful is not a denial of due process unless the defendant shows bad faith on the part of the police. Arizona v. Youn blood, 488 U.S. 51, 58 (1988); California v. Trombetta,467 U.S. 479,488-09 (1984). Limiting the scope of the due process clause in this context to a bad faith failure to collect such evidence "both limits the extent of the police's obligation ... to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." Miller v. Vasquez, 868 F.2d 1116, 1121 (9"Cir. 1988) citing Arizona v. Youngblood, 488 U.S. at 58, 109 S.Ct. at 337.

In examining this issue, the California Court of Appeal applied both Trombetta and Youngblood and made a distinction between an assertion of "failing to collect" and "failing to preserve" evidence because under California law, it is possible to demonstrate a violation of due process without a showing of bad faith for claims that police failed to preserve evidence. (Exh. 4, at 20). The court concluded, however, that Petitioner was asserting that police "failed to collect" evidence. Id. at 21. Thus, a showing of bad faith by police was necessary in order to demonstrate a due process violation. Id. at 20.

The court of appeal then examined each item Petitioner alleged *should* have been collected and determined that the

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[10]This section of Petitioner's argument appears on an unnumbered page of the Petition and is set forth as "Ground 1."

items were neither exculpatory in nature or an indication of bad faith on the part of the police. (Exh. 4, Answer). For example, retrieving the cell phone and finding Petitioner's blood on the phone would not have exonerated Petitioner but only demonstrate only that Petitioner handled the phone. Similarly, fingerprints which might have been obtained from bullet casings would not have contradicted eyewitness testimony that Petitioner fired the weapon at Silva and Charles. In fact, Petitioner himself testified to shooting Silva and shooting at Charles. (RT 7 RT 1677, 1761.) Experts for both the prosecution and defense further testified to the difficulty in obtaining usable fingerprints from the casings.[11] (1 KT 325, 337, 339.) The Court of Appeal concluded that the police "choosing to collect evidence based on the statements of eyewitnesses, the majority of which were consistent with each other and contrary only to the version told by the defendant" was not bad faith. (Exh. 4 at 24, Answer.)

In the federal petition, Petitioner's states that the evidence was necessary to undermine he credibility of the witnesses. (Petition, Ground 1.) However, as noted above, the discovery of "fingerprints other than Petitioner's on bullet casings, or on the telephone only indicates that petitioner handled the items. Petitioner conceded that he threw the phone and fired the gun. (8 tT 1663, 1665, 1760, 1763, 1765.) Such evidence is not the type that would demonstrate that Petitioner did not commit first degree or attempted murder.

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[11]Defense witness Thornton testified that casings "have something of a reputation for being difficult to recover latent fingerprints from . ."(8 RT 1862.) Ray testified that he had "processed hundreds of casings and ever once got a single fingerprint" (2 RT 325.) Ray expounded and stated that "even if I were to place a fingerprint on it as if to hold it to load it, I would only get a fragment of a fingerprint." (2 RT 337.)

The duty to preserve evidence is limited to material evidence, i.e., evidence whose exculpatory value. was apparent before its destruction. California v. Trombetta, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534 (1984). Petitioner has failed to demonstrate that the evidence not collected was material to his case such that he suffered prejudice, nor does he show that the failure to collect such evidence was due to bad faith on the part of police.

Accordingly, the Court finds that the California Court of Appeal's determination that Petitioner's due process rights were not violated, was not contrary to or an unreasonable application of clearly established federal law.

2. ***Insufficient Evidence***

Petitioner contends the evidence was insufficient to support his conviction for attempted, and/or first degree murder.

The law on insufficiency of the evidence claim is clearly established. The United States Supreme Court has held that when reviewing an insufficiency of the evidence claim on habeas corpus, a federal court must determine whether, viewing the evidence and the inferences to be drawn from it in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Sufficiency claims are judged by the elements defined by state law. Id. at 324 n. 16.

In the instant case, Petitioner alleges that the evidence was insufficient to support a finding of premeditation and deliberation because "everything happened] so fast, there was only reaction not premenditation [sic] or deliberation." (Petition, Ground 2.)

Under California law, a court reviewing for sufficiency of the evidence of deliberation and premeditation generally examines evidence of planning, motive, and method of killing (or attempted killing) to determine whether

premeditation and deliberation is shown. (Exh. 4 at 25, citing People v. Anderson, 70 Cal.2d 15 (1968), Answer.) In examining Petitioner's case, the Court of Appeal found evidence in each of the three categories (i.e., planning, motive, and method of killing) sufficient to support a finding of premeditation and deliberation.

With respect to Nathan Charles (hereinafter "Charles."), motive could be inferred from the fact that Charles witnessed Petitioner beat and shoot Silva. The Court of Appeal found that planning and method could also be inferred from in the fact that Petitioner left the scene momentarily and returned with a gun firing upon both Silva and Charles. The court noted further that Charles was unarmed and did not provoke Petitioner.

With respect to Andres Gonzales, the court again concluded that Petitioner's motive was the elimination of yet another witness as Gonzales was the only witness to Petitioner's attack on Ericka Munoz. There was testimony at trial by both Gonzales and Munoz that Gonzales did not provoke Petitioner but instead tried to calm him down. (3 RT 642; 4 RT 1407-1408.) Petitioner then paced the room scratching his head, entered the bathroom area, had a drink of milk, removed his knife from the sheath and swung it at Gonzales. (3 RT 642-643; 4 RT 1408.) Petitioner then repeatedly stabbed Gonzales "until Gonzales's condition was life-threatening." (Exh. 4 at 27, Answer.) From these facts, the court of appeal found a jury could easily infer premeditation and deliberation.

The court of appeal further found that Petitioner's motive for his attack on Silva was again to eliminate a witness to his attack on Gonzales. Planning and method could also be inferred from the fact that Petitioner left the area where Silva lay stabbed and beaten and returned with a.357 shooting Silva in the chest and at close range. Thus, viewing the evidence in the light most favorable to the prosecution, the

court of appeal found sufficient evidence to support the jury's findings.[12]

Following a thorough examination of the record, this court concludes that the finding of the court of appeal was not contrary to or an unreasonable application of federal law. The record supports not only the facts as stated by the California Court of Appeal, but also sets forth additional facts from which a jury could infer that Petitioner committed the murder and attempted murder with premeditation and deliberation. For example, Ericka Munoz testified that Petitioner, who was wearing the knife on his side, pulled it from the sheath and came towards her. (4 RT 1400.) He then put it away and said he was sorry. (4 RT 1400.) Ericka stated that following the apology, Petitioner asked for a hug and when she neared him to give him the hug, he again pulled the knife from the sheath, said "that's fucked up" and pulled her to the bed by her hair. (4 RT 1401-1402.) The fact that Petitioner returned the knife to the sheath and apologized before he removed it the second time and forced Ericka to the bed show that Petitioner had sufficient time to consider his actions and chose to try to hurt Ericka. However, Gonzales entered the room and interrupted the attack. (4 RT 1404-1405; 3 RT 640, 698.)

Similarly, the record demonstrates that Petitioner had sufficient time to consider his actions with respect to Gonzales. Both Ericka and Gonzales testified that following Gonzales entry into the room, Petitioner "got off Ericka,

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[12]Petitioner erroneously states in both his Appeal and the federal Petition that the standard of review is that the Court view the evidence in the light most favorable to his statement of the facts. As noted above, however, the proper standard under the law as established by the United States Supreme Court is that the court view the evidence in the light most favorable to the prosecution. Jackson v. Virginia. 443 U.S. 307, 319 (1979).

walked towards Gonzales and then began rubbing his head and pacing the room. (3 RT 642; 4 RT 1404, 1406-1407.) Gonzales attempted to calm Petitioner however, Petitioner who first had some milk to drink, exclaimed "this is not happening" and swung the knife at Gonzales. (3 RT 642-643; 4 RT 1407-1408, 1478, 1481, 1496.) Although Petitioner's testimony wholly contradicted that of Ericka and Gonzales, Ericka's testimony was consistent with Gonzales' version of the events and Gonzales and Ericka had not seen each other since the time of the murder. (4 RT 1384, 3 RT 658.)

Nathan Charles testified that when he looked out onto the catwalk, he witnessed Petitioner "viciously" beating Silva who was lying on the ground. (2 RT 419, 443, 446.) According to Charles, Silva was trying to cover his face with both hands and saying "I'm not going to die; you are not going to kill me." (2 RT 421-422.) To Charles, it appeared that Silva "could do nothing about []" Petitioner's beating him and did not fight back. (2 RT 356, 421, RT 446.) When Charles yelled out to Petitioner, Petitioner looked directly at Charles and ran back into the room. (2 RT 426; 446-447.) Charles then approached Silva who was on the ground "covered in blood" and witnessed Petitioner come out of the room with a gun, shoot Silva as Charles knelt beside him, and fire three more shots in Charles' direction as Charles fled. (RT 424, 426, 429-430, 452-53, 461.) Petitioner himself testified that he purposefully fired three more shots in Charles' direction, however, he did so hoping that Charles would keep running, get out of the area, and "maybe go call the cops or something." (8 RT 1677.)

Richard Freier, who was also staying at the hotel that night, testified that he was awakened by a male voice shouting profanity outside. (2 RT 354.) When Freier looked out his hotel room window he saw a big man with dark hair and a red shirt with writing on the front exit one of the rooms above, shoot in a downward direction, pause and then fire

two or three more times. (2 RT 356.) Freier then saw what appeared to be a person lying down and raising a hand come up from the ground. (2 RT 356). The man with the gun then returned to the room, exited again and exclaimed "we have to get out of here," and walked away carrying a black bag and stepping over the individual on the ground. (2 RT 359-360.)

Jay Loughlin, who shared a room with Nathan Charles, testified that he was awakened by yelling and witnessed Terry Silva out on the catwalk lying on his back prior to shots being fired. (RT 1689.) Mr. Loughlin further testified to witnessing Petitioner leave the scene walking calmly down the stairs and to his car. (RT 1695.) From the above testimony, a jury could infer that Petitioner was not being provoked and returned to the room to retrieve the gun and kill both Silva and Charles.

The testimony and evidence adduced at trial further demonstrates that Petitioner's actions do not support his testimony that he was in fear for his life but rather that he fled the scene because he had just attempted to kill three people. Despite his alleged fear, Petitioner, after stabbing Gonzales multiple times, stabbing and shooting Silva, and firing upon Charles, calmly returned to the room to collect his valuables, calmly exited the room, stepped over Silva (2 RT 514-515[13]; 3 RT 724[14]; RT 1677[15], proceeded down the stairwell, paused a moment to look up at. the sky as if to

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[13]This testimony was provided by James Riling, another guest at the hotel on th evening of the incident, (@ RT 507-534.)

[14]Donna Esty, who was also a guest at the hotel and girlfriend of James riling, provided this testimony. (3 RT 724-758.)

[15]Jay Loughlin, who stayed with Nathan Charles at the hotel, provided this testimony. (5 RT 1677).

collect his thoughts (2 RT 433), approached his getaway vehicle and then decided to lay on the ground for a moment before getting into the car and driving away. (2 RT 418, 434-435,). Petitioner did not look back to see if he was being followed. (2 RT 361.) However he testified that he believed Gonzales and Silva were trying to kill him. (8 RT 1669-1670, 1671, 1673, 1696-1698, 1759.) The record contains the testimony of experts who provided that the double action .357 required ten lbs of pressure before it could fire. (8 RT 1812.) The record is rife with testimony and evidence that refutes Petitioner's version of the events. Viewing the evidence and inferences that can be drawn in the light most favorable to the prosecution, this Court finds that the state court's determination that the evidence was sufficient to support the convictions for murder and attempted murder was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Petitioner's claim must be denied.

3. ***Collateral Estoppel Bar From Using Drug IndiciaEvidence***

Deputy Joseph Guiffre (hereinafter "Guiffre"), a senior deputy with experience in narcotics trafficking, testified in rebuttal that based on the manner in which the money was packaged (to keep police dogs from smelling drugs), the presence of the cell phone, pager, bugging device, coding of telephone numbers on the cellphone, and two vehicles, he felt that the large amount of cash might have been intended for a drug transaction. (8 RT 1822-1823, 1826, 1831,1832-33,1823,1835.) Petitioner contends that the doctrine of collateral estoppel precluded the prosecution from attempting to re-litigate whether the money indicated that Petitioner was engaged in a drug transaction.

Collateral estoppel means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties

in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189 (1970); see also, Dowling v. United States, 493 U.S. 342, 348, 110 S.Ct. 668 (1990) (clarifying that the prior acquittal must have determined an ultimate issue presented in the subsequent trial); Santamaria v. Horsley, 133 F.3d 1242, 1244-45 (9th Cir.) (en banc), cert. denied, 525 U.S. 824, 119 S.Ct. 68 (1998).

In criminal cases, the rule of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy." Ashe v. Swenson, 397 U.S. 436, 445, 90 S.Ct. 1189 (1970). The Double Jeopardy Clause protects against multiple convictions and "against being twice put to trial for the same offense." Abnev v. United States, 431 U.S. 651, 662 (1977) (emphasis added).

In the instant case, Petitioner did not present his claim to the California Supreme Court as a double jeopardy claim or any other federal constitutional claim. Thus, to the extent Petitioner is alleging a violation of double jeopardy, such claim is unexhausted. See, Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (in order to properly exhaust, Petitioner must have specifically told the state court that he was raising a federal constitutional claim). Notwithstanding exhaustion, Petitioner's claim fails on its merits.

The forfeiture action against Petitioner was dismissed due to a lack of probable cause. (Exh. 4 at 29, Answer.) In addition, no drug related charges were ever made against Petitioner in the instant criminal case. Thus, under the doctrine of collateral estoppel, Petitioner's claim fails as the action did not determine issues resulting in a valid judgment.

Any claim of double jeopardy also fails as the forfeiture of property under California Health & Safety Code § 11470(f) does not result in a criminal conviction such that double jeopardy would preclude a subsequent criminal action. See, United States v. Urserv, 518 U.S. 267, 116 S.Ct. 2135 (1996)

(civil forfeitures are "neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause.").

Insofar as the Petition challenges the admission of Deputy Giuffre's testimony at trial, the Court finds no violation of Petitioner's due process rights. The admission of evidence in a state trial is generally not subject to federal habeas review unless the Petitioner can show that there were no permissible inferences to be drawn from admitted evidence and that the evidence is "of such quality as necessarily prevents a fair trial." Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir.1991), quoting Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9thCir.1986).

As noted by the California Court of Appeal, Deputy Giuffre's testimony was relevant for impeachment purposes and not to prove that Petitioner was actually involved in a drug related action. The Court of Appeal noted:

> [T]estimony that the money and other personal items of defendant were indicia of drug trafficking tends to prove defendant's paranoia as described by Munoz and Gonzales. It also provides a reason for defendant's attack on Munoz and Gonzales. The testimony would also help explain defendant's action in using the bug sweeper upon entering the motel room.

(Exh. 6 at 32, Answer.) The fact that Petitioner may have intended to be involved in a drug transaction could reasonably be considered to show that Petitioner's justification for the trip to Los Angeles, money, pagers, cell phones and the need for two vehicles was for reasons other than what he testified to. Accordingly, Petitioner's due process rights were not violated and the state court's determination that collateral estoppel did not preclude the testimony of Deputy Guiffre was not contrary to or an unreasonable application of federal law.

4. Prosecutorial Misconduct

Petitioner argues that the prosecution intimidated the defense witnesses in violation of his federal constitutional rights.

"[S]ubstantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." United States v. Little, 753 F.2d 1420, 1438 (9th Cir.1984). This proposition is well established. See, e.g., Webb v. Texas, 409 U.S. 95, 97-98, 93 S.Ct. 351 (1972) (defense witness intimidated into not testifying by remarks of trial judge violated due process); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920 (1967) (right to present witnesses to establish defense is fundamental to due process); United States v. MacCloskey. 682 F.2d 468 (4th Cir.1982) (prosecution telephoned defendant's girlfriend's attorney to advise him to remind his client that if she testified at trial she could be reindicted on dropped charges); United States v. Henricksen, 564 F.2d 197, 198 (5th Cir.1977) (defense witness intimidated by terms of co-defendant's plea bargain); United States v. Morrison, 535 F.2d 223, 226-28 (3rd Cir. 1976) (defense witness intimidated by prosecutor's remarks); United States v. Thomas, 488 F.2d 334, 335-36 (6th Cir.1973) (defense witness intimidated by remarks of secret service agent during court recess).

To succeed on this claim, Petitioner must demonstrate some sort of government misconduct and the misconduct must be the substantial cause for the witness refusing to testify. See, United States v. Hoffman, 832 F.2d 1299, 1303 (1st Cir.1987); Berg v. Morris, 483 F.Supp. 179, 184 (E.D.Cal.1980). Petitioner must also show that the witnesses' testimony would have "been both material and favorable to his defense." United States v. Valenzuela-Bemal, 458 U.S. 858, 867, 102 S.Ct. 3440 (1982) (footnote omitted).

The California Court of Appeal examined this issue in light of the California Supreme Court's holding in In re Martin, 44 Cal. 3d 1 (1987). In Martin, the Court held that a

defendant's constitutional right to compulsory process is violated with the government interferes with the exercise of his right to present defense witnesses, including, "of course, the intimidation of defense witnesses by the prosecution." Id. at 30. To establish such a violation under Martin, a defendant must establish misconduct by showing only that the government engaged in activity wholly unnecessary to the performance of his duties and of such a character that it transforms a defense witness from a willing witness to one that is now unwilling to testify. Id.

In addition, he must demonstrate interference, i.e., a causal link between the misconduct and his ability to present witnesses on his behalf. To do this, he need only show that the conduct was a substantial cause. Id.

Finally, a defendant must establish materiality. Id. Under federal law, he must "make some plausible showing of how [the] testimony [of the witnesses] would have been both material and favorable to his defense. Id. "Under California law, he must show at least a reasonable probability that the witness could have given testimony that would have been both material and favorable." Id.

Of the four witnesses Petitioner alleges were intimidated by the prosecution, Cuevas, Keyser, Ortiz and Aloes, only Keyser and Aloes, did not testify. However, as noted by the Court of Appeal, Petitioner failed to demonstrate that the alleged intimidation was the cause for Keyser and Alnes' failure to testify. Further, Petitioner did not demonstrate or allege that Ortiz and Cuevas, did not testify to the fullest extent of their knowledge because of the alleged intimidation. (Exh. 4 at 36-38.) Thus, the Court found no constitutional violation.

The Court went on to say that even had they found the prosecution's actions to be a substantial cause for a witness not testifying, Petitioner's claims would fail on materiality grounds. Id. Petitioner conceded in his briefing to the Court

of Appeal that the only thing that resulted from the prosecutor's actions was the absence of testimony that the .22 handgun was purchased for Gonzales at a flea market by Alnes with knowledge that the gun was stolen. Exh. 3, at 69-70). The Court found this information neither material or favorable.

> At best the testimony may have been relevant to call into question Gonzales credibility, since he testified he bought the gun from defendant. However, Gonzales admitted he lied to police about his knowledge of any firearms, and he personally informed the police where they could find the .22. Thus, any information regarding how he acquired the gun would have been both cumulative and marginal in its usefulness.

(Exh.4 at 38). The Court of Appeal concluded that none of the defense witnesses were hindered by their contact with the government, and thus, no prejudice occurred.

This Court similarly concludes. Petitioner does not allege that any of the witnesses did not testify or did not testify to the full extent of their knowledge as a result of the prosecutor's actions. Petitioner states only that the actions of the government were "outrageous misconduct." Petitioner argues that based on this conduct, reversal of the judgment is warranted. However, in addition to the above, he fails to provide any information as to how the conduct prejudiced him such that it rose to the level of a federal constitutional violation. Alnes, who did not testify, was subpoenaed to provide testimony that Petitioner asked him to watch his house for the weekend and that while there, he saw petitioner counting a large sum of money. (Petition, ground 4; Exh. 2, Petitioner's brief on Appeal to the California Court of Appeal, pg. 65). Keyser was subpoenaed to testify to the various versions of the events told to him by Ericka Munoz. Id. While neither of these individuals testified, Petitioner

does not allege that their absence was due to actions by the government. In addition, the testimony to be provided was not material or favorable. That Alnes witnessed Petitioner counting money is irrelevant to whether or not Petitioner committed murder. Keyser's testimony would have only undermined the credibility of Ericka, however, as Ericka did not witness the murder, the testimony was not material to Petitioner's defense such that Keyser's absence might have prejudiced Petitioner. Thus, even in the event Alnes and Keyser's absence was due to governmental actions, their testimony was not material or substantial such that a constitutional violation occurred. United States v. Valenzuela-Bemal. 458 U.S. 858, 867, 102 S.Ct. 3440 (1982).

Accordingly, the Court finds no constitutional violation occurred and the state court's determination on this claim was neither contrary to or an unreasonable application of federal law.

5. ***Prosecutorial Misconduct -Closing Argument***

Petitioner contends that the prosecution trivialized the decision the jury had to make with respect to premeditation and deliberation during closing argument. Thus, he contends, it minimized the burden of proof by equating it to "unpressured decisions that jurors themselves make every day" and "inviting them to make the decision in the same way they approach their daily life." (Petition, Ground 5.) During closing argument, the prosecution stated:

> You will get a jury instruction which says premeditation can happen in a very short period of time. People decide to kill all the time and everything about the defendant's behavior is consistent with that. The defendant left Hollister, California on his drug run and he intended to kill anybody who got in his way.
>
> When he got up from trying to kill Andres Gonzales and went to the door, he intended to kill

whoever was behind the door. Sometimes people don't have their victims picked out. Let me give you an example of how fast we can premeditate things.

I used to drink regular coffee and I really like it but it bothered me so I went to the decaf coffee and you buy little boxes. Sometimes I would get up in the morning knowing full well caffeine in coffee would cause me to feel not great. I would look at the two boxes. I know caffeine is going to make me feel bad. I have deliberated and decided and weighed the risk. I know how I am going to feel and I choose the coffee.

Have you ever gone to Jack In The Box and looked at the menu and said, "I would really like to get the hamburger?" However, you want to stay on your diet. So you think "I will start tomorrow. I will have the cheeseburger." It probably takes three seconds.

What about when you come to a green light and it turns amber and you are real close to an intersection? Your life and maybe the lives of your family in the car depend on how you make a calculated decision in a short period of time. As you approach the intersection and it is yellow you say to yourself, can I make it, does my car stop fast, I will stop or go and decide. The fact of the matter is the judge will tell you it is the time used to determine premeditation and deliberation but it is a cold, calculated decision, one that defendant clearly made.

(9 RT 2002.)

A habeas petition will be granted for prosecutorial misconduct only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 171, 106 S.Ct. 2464 (1986) (quoting Donnelly v. DeChristoforo, 416

U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974)); see, Bonin v. Calderon, 59 F.3d 815, 843 (9th Cir. 1995). To constitute a due process violation, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v. Miller, 485 U.S. 756, 765, 107 S.Ct. 3102, 3109 (1987) (quoting United States v. Bagley,473 U.S. 667, 105 S.Ct. 3375 (1985)). Under this standard, a petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial - i.e., that absent the alleged impropriety, the verdict probably would have been different.

In his argument before the Court of Appeal, Petitioner relied on the case of People v. Nguyen, 40 Ca1.App.4th 28 (1995). However, the Court of Appeal found Nguyen distinguishable because in Nuyen, the prosecution, in closing, directly referenced the burden of proof, whereas here, the prosecution referenced only to the elements of the offense. (Exh. 4 at 39-40.) The California Supreme Court in Nguyen found the comments made regarding the burden did not prejudice the defendant because the prosecutor directed the jury to read the reasonable doubt instruction and the jury was correctly instructed on the standard. Id. at 40.

Petitioner's argument that the commentary constituted prosecutorial misconduct fails on federal constitutional grounds. As noted by the California Court of Appeal, the commentary by the prosecution did not concern the burden of proof, but rather the elements of the offense. No misstatement of law occurred and the prosecutor informed the jury that it would be given a jury instruction on premeditation and deliberation, that this instruction would be the law and directed the jury to read that instruction. (9

RT 2002[16]; 9 RT 2003[17].)

Finally, at the close of arguments, the court instructed the jury on the proper elements of the offense (CALJ1C 8.20), and squarely placed the burden on the prosecution to prove each and -very element beyond a reasonable doubt (CALJIC 2.90). (9 RT 2610-13.) Accordingly, the commentary regarding premeditation and deliberation did not infect the trial such that the entire process was rendered fundamentally unfair. Darden v. Wainwright, 477 U.S. 168, 171, 106 S.Ct. 2464 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974)). The Court finds the state court's determination of this claim was not contrary to or an unreasonable application of federal law such that the petition can be granted.

ORDER

Accordingly, having found that the state court's determination of the claims raised in the. instant federal petition were not contrary to or an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence presented, the Court HEREBY ORDERS:

1. The Petition for Writ of Habeas Corpus be DENIED

---

[16]"You will get a jury instruction which says premeditation can happen in a very short period of time." (9 RT 2001.)

[17]"That is what the jury instruction says and let there be no mistake. In part, because I am not going to read the instructions because the judge is going to read them, the true test is not the duration of time. That is the law the judge will give you you promised to follow but rather it is the extent of reflection, calculated judgment made in a very short period of time. It goes on to talk about numerous other things, ladies and gentlemen." (9 RT 2003.)

on the merits.

2. The Clerk of Court is DIRECTED to ENTER JUDGMENT in favor of Respondent.

This order terminates the action in its entirety.

IT IS SO ORDERED.

Dated: 9/14/03

s/SANDRA M. SNYDER
UNITED STATES MAGISTRATE JUDGE

Appendix C

FILED
JUDGMENT ENTERED
8/20/03

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARMANDO MUNOZ,
Petitioner,
vs.
M. KNOWLES, WARDEN,
Respondent.

CV F 01 5705 SMS HC

JUDGMENT IN A CIVIL ACTION

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be DENIED on the merits.

Dated: 8/20/03.

JACK L. WAGNER, Clerk l

By: s/ Deputy Clerk

Appendix D

FILED
2003 OCT 9
By: Clerk, U.S. Dist. Ct

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARMANDO MUNOZ,
Petitioner,
vs.
M. KNOWLES, WARDEN,
Respondent.

CV F 01 5705 SMS HC

ORDER DENYING LODGED MOTION FOR SUBSTITUTION OF ATTORNEYS
(Document #1)

ORDER DENYING REQUEST FOR A CERTIFICATE OF APPEALABILITY
(Document #2)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Judgment in the instant case was entered on August 20, 2003. A Notice of Appeal was led on September 18, 2003.

On September 19, 2003, a Motion for Substitution of Attorneys was submitted by Petitioner and new counsel.

A. Motion for Substitution of Attorneys

Local Rule 83-182(e) provides that an attorney who has appeared in an action and wishes to withdraw from an

action must submit a substitution of attorneys. Local Rule 83-182(e). However, in this case, Petitioner is not an attorney licensed to practice law. Thus, a substitution not necessary. Instead, counsel may make an appearance in the matter by signing or a pleading by an attorney constitutes an appearance by that attorney in the matter. Local Rule 83-182(a).

Accordingly, the Substitution of Attorneys is DENIED.

B. Notice of Appeal/Request for a Certificate of Appealability

On September 18, 2003, Petitioner filed a Notice of Appeal of the Magistrate Judge's Judgment. Petitioner filed a formal request for a certificate of appealability on September 19, 2003.

The controlling statute, 28 U.S.C. § 2253, provides as follows:

1. In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
2. There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

1. the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
2. the final order in a proceeding under section

2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In the present case, the Court finds that petitioner has not made the required substantial showing of the denial of a constitutional right so as to justify the issuance of a certificate of a certificate of appealability. Accordingly, Petitioner's request for a Certificate of Appealability is DENIED.

IT IS SO ORDERED.

Dated: 10/08/03

s/ SANDRA M. SNYDER
UNITED STATES MAGISTRATE JUDGE

Appendix E

FILED
DEC 17 2003
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARMANDO MUNOZ,
Petitioner-Appellant,
v.
M. KNOWLES, WARDEN,
Respondent-Appellees.

No. 03-16964
D.C. No. CV-01-05705-SMS
(Eastern California, Fresno

ORDER

The request for a certificate of appealability is denied. See 28 USC § 2253(c)(2). All outstanding motions are denied.

Appendix F

STATUTES

FEDERAL STATUTES - 28 U.S.C.

28 USCS § 2253

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 USC § 2254

§ 2254. State custody; remedies in Federal courts

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

CALIFORNIA STATUTES

Cal Pen Code § 187 (2004)

§ 187. Murder defined

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

Cal Pen Code § 245

§ 245. Assault with deadly weapon or by force likely to produce great bodily injury

(a) (1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($ 10,000), or by both the fine and imprisonment.

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($ 10,000) and imprisonment.